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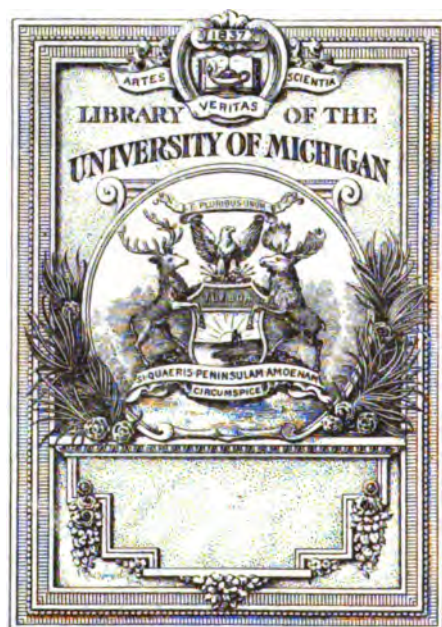
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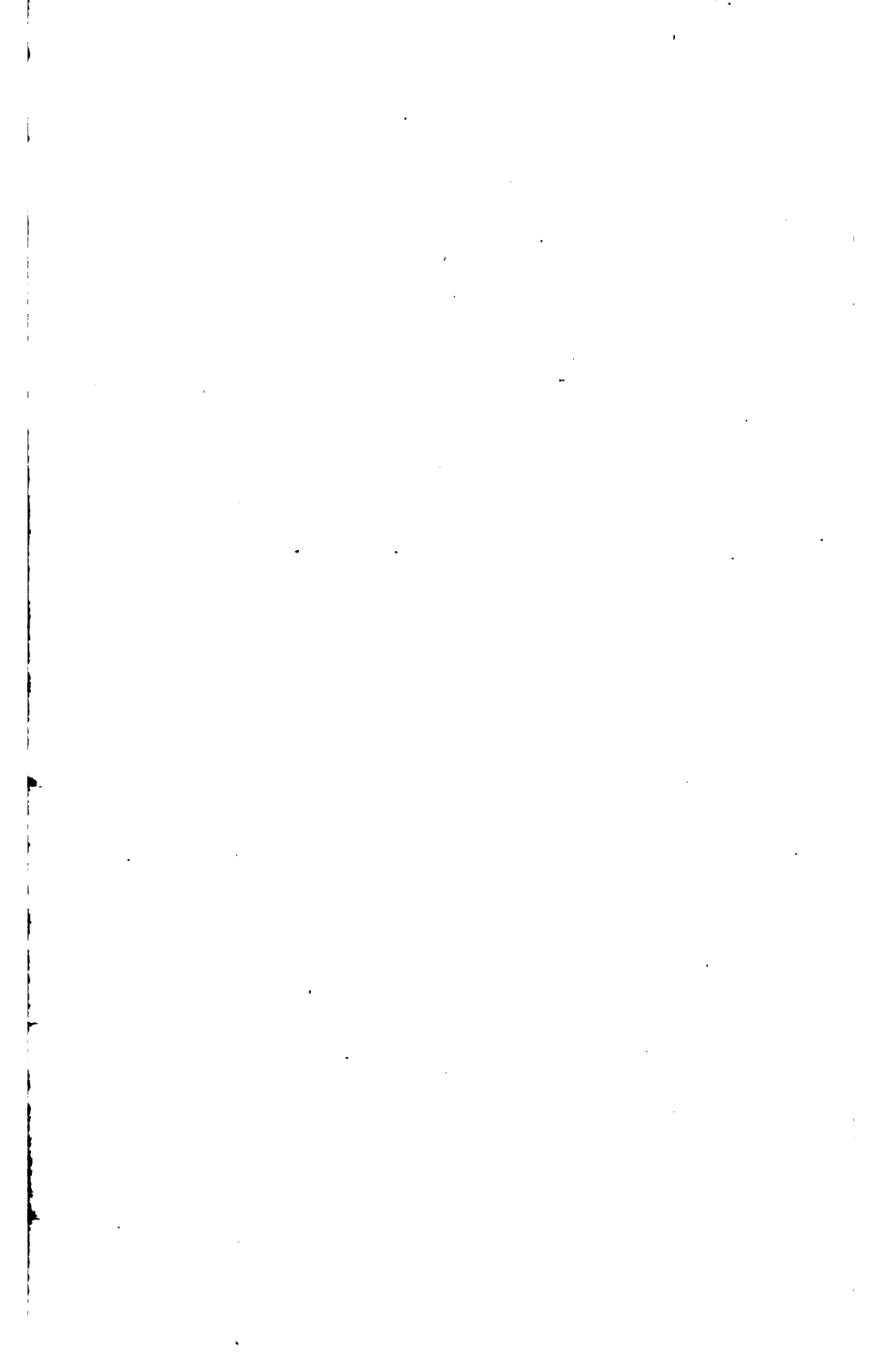
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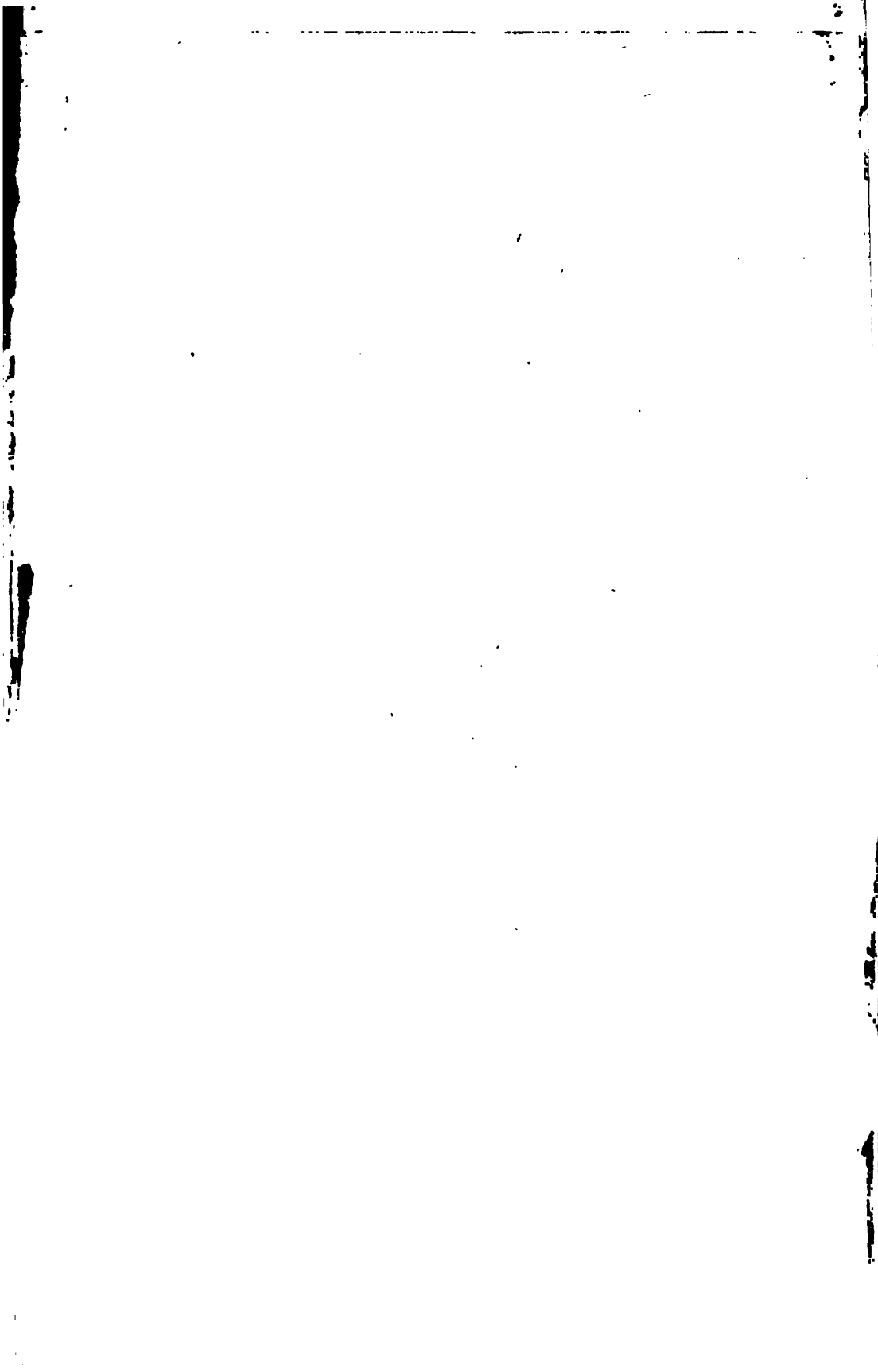


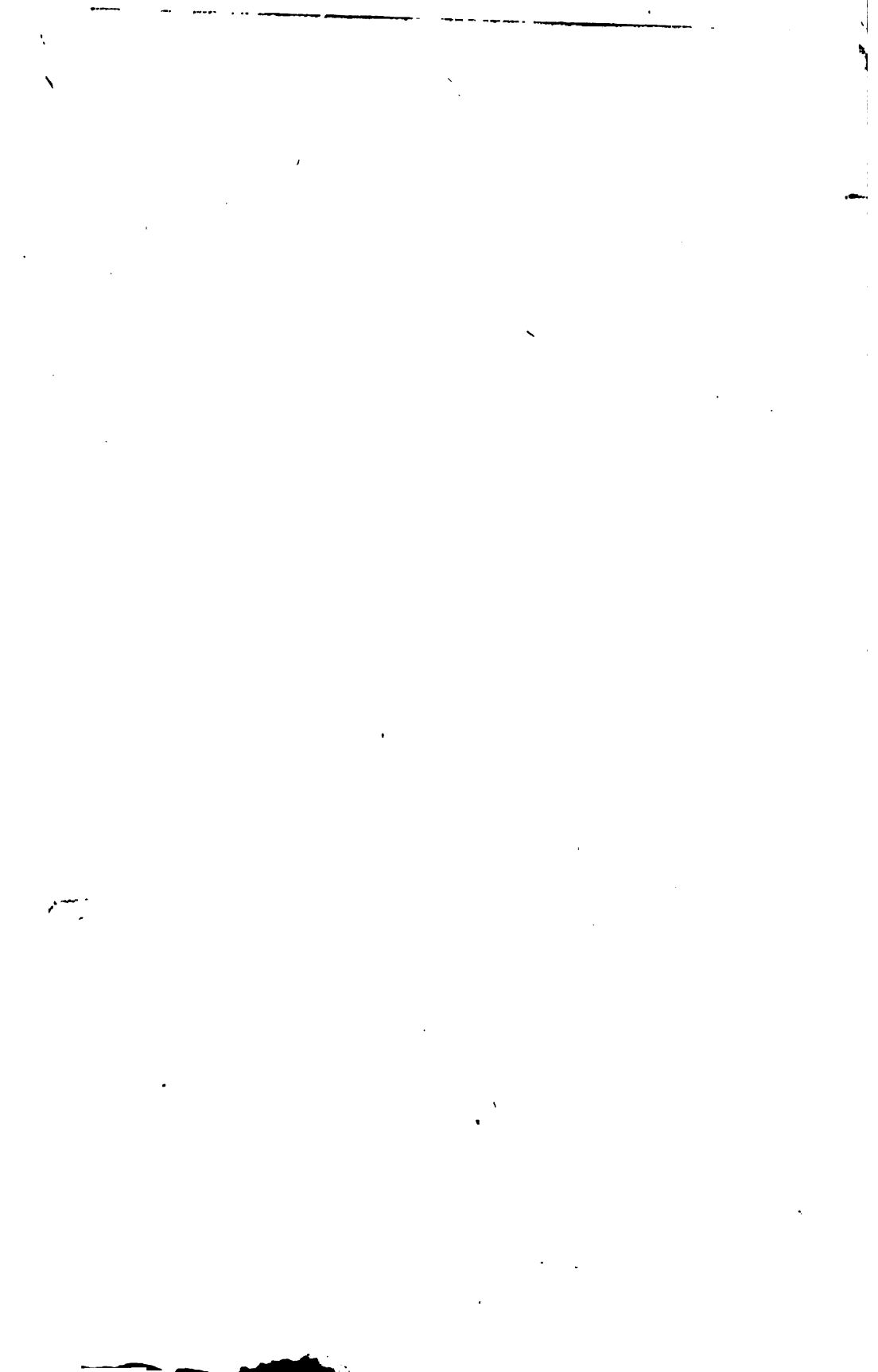
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THE
COMMERCE CLAUSE

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OF THE

FEDERAL CONSTITUTION

BY
E. PARMALEE PRENTICE

AND
JOHN G. EGAN
OF CHICAGO

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THE COMMERCE CLAUSE

OF THE

FEDERAL CONSTITUTION.

CHAPTER I.

HISTORY OF THE COMMERCE CLAUSE

The commerce clause of the Federal Constitution presents the remarkable instance of a national power which was comparatively unimportant for eighty years, and which in the last thirty years has been so developed that it is now, in its nationalizing tendency, perhaps the most important and conspicuous power possessed by the Federal government.

The fact is more remarkable because the deficiency in the Articles of Confederation most felt was the lack of this very power,¹ and because the Convention which framed the Federal Constitution was immediately brought about by the recognized necessity of an uniform system in the commercial regulations of the several States.

The result of that Convention, so far as regards uniformity of general commercial regulations, was expressed in twenty-one words: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

That is all save what may be found by implication.

At this distance of time, and in the changed conditions of modern trade, it is difficult to determine satisfactorily what was intended by those who framed this provision, and the ap-

¹ Federalist, No. XXII.

parent difficulty increases upon consideration of the early history of the clause.

At the time of the adoption of the Constitution, navigation afforded the only means of conducting commerce on a large scale. It seems, therefore, that it must have been intended by the commerce clause to give Congress control of navigation when carried on among the States, and yet as late as 1824 this appears to have been doubted, and was settled in that year in the case of *Gibbons v. Ogden*.¹

Aside from navigation, commerce among the States was, in 1787, conducted by coaches and wagons, and it appears to have been considered that the control of vehicles engaged in this commerce did not belong to the Federal government.²

The question naturally arises, therefore, what the Convention could have contemplated, if it did not intend by this clause to give the Federal government control of transportation either by land or water.

Purpose of the Commerce Clause.—The journals of the Convention and the public discussions of the period offer no conclusive answer to this question; but it appears that under a form of expression sufficiently general to give Congress power at all times to prevent burdensome, conflicting or discriminating State legislation, the Convention had prominently in mind the regulation of foreign commerce by the passage of a navigation act and the imposition of a tariff; while, so far as concerned interstate commerce, nothing more was immediately intended than to enable Congress to prevent the imposition of duties by particular States upon articles imported from or through other States.³

Interstate commerce in the eighteenth century was simple in its relations. The business of each State was its own. Great enterprises owned in one State engaged in commerce

¹9 Wheaton, 1.

³ Views of President Monroe upon

² Perrin v. Sikes, 1 Day (Conn.), Internal Improvements, inclosed in p. 19; McMaster's History of American People, vol. II, p. 60. Message to Congress, May 4, 1822.

in others, and subject to their jurisdiction, were few and comparatively unimportant. The imposition of a tariff at State lines was in 1787 the easiest way in which one State could tax the traffic or produce of another.¹

In the case of foreign commerce the situation was different. When the Constitution was framed, one of the great grievances of the country was in the English Navigation Act, by which American vessels were excluded from the West India trade, and in trading directly with Great Britain were permitted to carry only the products of the State of which their owners were citizens. On the other hand, the United States, under the Confederation, was unable to protect its own trade or to impose any restrictions upon foreign vessels trading in American ports. It was necessary that power be given to the Federal government to pass a navigation act for the protection of American shipping and to build a navy.²

It was necessary, too, for the maintenance of government, that a national revenue be raised, and it was felt that customs duties offered one of the best means of providing such a revenue. The foreign trade belonged to the nation, not to individual States, and revenue arising from it should be used for general purposes, and not alone for the benefit of the State in whose harbor goods were landed.

These were the difficulties which pressed upon the States under the Articles of Confederation, and which the Constitution was to remedy.³

¹ Federalist, No. XLII.

² Federalist, No. XI.

³ Proceedings of Congress as to Regulation of Commerce, April 30, 1784; Resolution to Empower Congress to Regulate Trade, Virginia House of Delegates, Nov. 30, 1785, 4 Journals of Congress (Wash., 1823), 631.

For the history and causes of attempts at unity of commercial reg-

ulation, prior to the adoption of the Constitution, see Bancroft's History of the Constitution of the United States, vol. 1, pp. 146, 184, 192-200, 206, 249-261, 336-348; vol. 2, pp. 74, 75, 162; Curtis' Constitutional History of the United States (1897), vol. 1, pp. 186, 284, 328, 494; Fisher's Evolution of the Constitution of the United States, pp. 223, 225, 238, 241; Fiske's American Revolution, vol. 1,

Proceedings of the Constitutional Convention.—The recorded history of the commerce clause before the Constitutional Convention is brief. Its origin is found in the sixth resolution, submitted to the Convention by Edmund Randolph on the 29th day of May, 1787. This resolution, outlining the commercial powers which should belong to the Federal government, stated:

“That the national legislature ought to be empowered to enjoy the legislative right vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”¹

This resolution, while necessarily vague except as to its purpose, was in that respect entirely explicit. It was intended that Congress should, under the new government, have all the powers which it had under the old, and, in addition thereto, such further powers as were necessary to enable it to prevent a continuation of the evils experienced under the Confederation.

The commercial powers vested in Congress by the Articles of Confederation included the sole and exclusive right and power of regulating the alloy and value of coin struck by

pp. 7, 12; Madison's Works, vol. 1, pp. 201, 202; McMaster's History of the People of the United States, vol. 1, pp. 206, 207; Parton's Life of Benjamin Franklin, vol. 1, pp. 337, 339; Preston's Documents Illustrative of American History, pp. 146, 147, 170, 179, 192, 196, 199, 204; Von Holst's Constitutional History of the United States, translated by Lalor & Mason, vol. 1, p. 47; Articles of Confederation, arts. 4, 6, 9; Federalist, edited by J. C. Hamilton, Historical Notice, p. 46, Introduction, pp. 8, 10, 48, Nos. 4, 7, 11, 22, 42. On the history of the control by the

British King and Parliament over foreign commerce of the colonies, see Bancroft's History of the United States, vol. 1, pp. 146, 148; vol. 2, pp. 78, 80-85; Burke's Speech on American Taxation; Green's History of the English People, vol. 4, pp. 198, 200, 219, 228, 229, 250-254; Preston's Documents Illustrative of American History, pp. 188, 192; Woodburn's The Causes of the American Revolution; vol. 10, Johns Hopkins University Studies, 557.

¹ Elliott's Debates (Wash., 1836), vol. 1, p. 144.

their own authority, or by that of the respective States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians not members of any of the States, provided, however, that the legislative right of a State within its own limits should not be infringed or violated; and lastly, of establishing and regulating post-offices from one State to another throughout the United States, and exacting such postage on papers passing through the same as should be requisite to pay the expenses of the office.¹

These powers, then, were all to belong to Congress under the Constitution.

The Articles of Confederation further provided that the people of each State should have free ingress and regress to and from any other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions should not extend so far as to prevent the removal of property imported into any State to any other State of which the owner was an inhabitant.² States were prohibited also from laying imposts or duties which should interfere with any stipulation in treaties entered into by the United States with any king, prince or state in pursuance of treaties which had been already proposed by Congress to the courts of France and Spain.³

The provisions last referred to and contained in the fourth and sixth of the Articles of Confederation vested no rights in Congress and therefore were not strictly within the scope of Randolph's resolution.

That part of the sixth article which has been quoted is represented by a separate clause in the Constitution. The provision quoted from the fourth article, however, found no place in the Constitution except such as has been given to it by necessary implication.⁴ Taking the resolution as it reads,

¹ Article IX.

² Article IV.

³ Article VI.

⁴ *Crandall v. Nevada*, 6 Wall. 85.
See *post*, pp. 87, 88, 217.

it must have contemplated giving to Congress general power to regulate interstate and foreign commerce, for it was separate commercial legislation of the States and the want of a general power over the subject by the Federal government which threatened the harmony of the United States under the Confederation.

These were the evils which the Convention met to remedy, and the resolution adopted proposed to give to Congress the most general and unlimited power over the whole subject. The development of the existing Federal power stated in the Constitution from the outline contained in Randolph's resolution is, therefore, in form, a history of successive limitations.

The subject upon which the debates of the Convention principally turned, in the consideration of this resolution, were Federal taxation of exports, control of the slave trade, and the passage of a navigation act.

From the standpoint of the Northern States, Federal control of the slave trade was an indispensable necessity. The first great compromise of the Constitution, the inclusion of slaves in estimating population as a basis of representation in the government, placed those States where slaves were few in number at an immediate disadvantage, and required for their future protection that some effective check should be placed upon the increase of slave population by importation.

Furthermore, the shipping interests of Northern States needed the protection of a navigation act, and the desire for this protection was one of their principal inducements to seek an amendment of the Articles of Confederation and a strengthening of the Federal government.

On the other hand, the Southern States needed slaves, and in North Carolina, South Carolina and Georgia the slave trade was not prohibited; the Southern States had little interest in shipping, but were dependent upon their exports, and were more concerned in procuring cheap transportation, than in the nationality of the vessel by which transportation was made. A tax upon exports was therefore out of

the question, and a navigation act should require a two-thirds vote, lest, as Mason said, "a few rich merchants in New York, Philadelphia or Boston might by that means monopolize the staples of the Southern States."¹

In the final solution of these difficulties special clauses were inserted in the Constitution exempting exports from taxation and preventing abolition of the slave trade by Congress prior to the year 1808.

The struggle over the question of the majority necessary to the passage of a navigation act concerned, however, the commerce clause alone.

In the draft of Constitution submitted to the Convention on May 29, 1787, and said to have been proposed by Charles Pinckney,² appears the first outline of the commerce clause as it now stands. In this draft, among grants of power to Congress to raise revenue, to coin money, to establish post-offices, post and military roads, and other grants upon related subjects, appears a grant of power in general terms "to regulate commerce with all nations and among the several States." The powers of Congress were, however, to be subject to the limitation that "all laws regulating commerce shall require the assent of two-thirds of the members present in each House."³

On the 26th of July the Convention referred to the Committee of Detail the several drafts which had been before it, together with the resolutions embodying the results of their deliberations, and on the 6th of August this committee reported a draft of a Constitution which contained the general grant of power to Congress "to regulate commerce with foreign nations and among the several States," but altered the limitation upon this power so that "No navigation act shall be passed without the assent of two-thirds of the members present in each House."⁴

¹ Bancroft, vol. VI, p. 364.

² Elliott's Debates, vol. I, p. 148.

³ Elliott's Debates, vol. I, p. 147.

⁴ Elliott's Debates, vol. I, pp. 224,

Bancroft, vol. VI, p. 215, says that 230.

no copy of Pinckney's plan was preserved and no part used.

The change of wording shows that the committee considered other regulations of commerce beside a navigation act, to be within the scope of the clause, but nothing in the record of the Convention indicates what the views of the committee were on this phase of the subject.

The important acts of commercial regulation which were discussed, either before or after the meeting of the Convention, were the passage of a navigation act and the imposition of a tariff,¹ and it is probable that the only regulations which the committee had in view, beside these, were of a purely local character, not directly affecting transportation.

The question of revenue being disposed of by separate provisions of the Constitution, the subject of a navigation act was probably considered to cover the greater part of the field of commercial regulation, so far as concerned matters of national interest.

It was in the debate upon the report of this committee that the questions of taxation of exports, regulation of the slave trade, and passage of a navigation act came before the Convention. On the 21st of August a resolution was adopted exempting exports from taxation, and on the next day the other matters in controversy were referred to a Grand Committee consisting of one member from each State,² and the report of this committee, leaving the control of navigation with a majority of Congress, and giving the Federal government power to prohibit the slave trade, after the year 1808, forms the second great compromise of the Constitution.

In the course of the debate upon the extent of the commercial power to be given the Federal government, many grants were discussed aside from the powers of regulation and taxation.

¹ Proceedings of Congress Concerning Duties, Feb. 3, 1781; 3 Journals of Cong. 572, 578; Proceedings of Congress as to Regulation of Commerce, April 30, 1784; 4 Journals of Cong. 392, 398; Resolution to Empower Congress to Regulate Trade, Virginia House of Delegates, Nov. 30, 1785. See 4 Journals of Cong. 621.

² Curtis' Constitutional History of the United States, vol. I, p. 508; Elliott's Debates (Wash., 1896), vol. V, p. 460; vol. I, p. 256.

On the 18th of August it was proposed to give Congress power to grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent; to regulate stages on the post-roads; to regulate affairs with the Indians; and to establish institutions for the promotion of agriculture, commerce, trade and manufactures. On the 14th of September a motion was made by Franklin that Congress be given power "to provide for cutting canals." Such a power, Wilson said, was necessary in order to prevent a single State from obstructing the general welfare. The motion was lost on the ground that the expense thereby incurred would be a general burden, while the benefit would be local.¹

The brief outline of proceedings given above, indicates that in the course of its debates, the Convention had under consideration extensive grants of commercial power; that as the session neared its close it was proposed to grant powers which would have conferred the authority to make internal improvements, the right to charter a bank, and power over many other subjects which have been prominent in constitutional history.

All motions to make these grants in express terms were lost, so that the commerce clause was finally adopted in substantially the form in which it was first drawn, the limitation upon the power of a majority of Congress being removed, and the words "and with the Indian tribes" being added.

Even in this brief form, however, the clause was in broad terms and conveyed a great power. Monroe said that such a grant of power to Congress involved "a radical change in the whole system of our government."²

The Place in the Constitution Occupied by the Clause.—At the same time it is probable that only one side of the case came conspicuously into view. The creation of a Fed-

¹ Bancroft, vol. VI, pp. 360, 361.

² Bancroft's History of the United States, vol. VI, p. 143.

eral jurisdiction to make uniform commercial regulation was accepted as a remedy for then existing troubles, without full comprehension of consequent limitations upon powers of the States.

Perhaps this appears in some degree from the position which the commerce clause occupies in the Constitution.

Constitutional provisions upon this general subject are numerous. The most prominent grants of commercial power to the government are:

- 1st. The power to coin money.
- 2d. The power to establish uniform laws of bankruptcy.
- 3d. The power to establish post offices and post roads.
- 4th. The power to regulate weights and measures.
- 5th. The admiralty jurisdiction.
- 6th. The control of patents and copyrights.
- 7th. The commercial power involved in taxation.

This last seems to be expressly recognized by the clause which forbids the Federal government to give a preference to the ports of one State over those of another, by any regulation of commerce or revenue.

Upon the States are imposed certain express prohibitions, such as those forbidding the coinage of money and the passage of laws impairing the obligations of contracts, or laying duties of tonnage, or taxation of exports or imports; and these prohibitions increase the effectiveness and importance of the Federal powers.

Is the Federal Commercial Power Exclusive?—Finally, as a general and comprehensive provision, including ground to some degree covered by each of the foregoing provisions, and extending indefinitely beyond, we find the general commerce clause.

As will be seen, most of the foregoing powers granted to Congress and not expressly prohibited to the States are powers which it is now established, by a long course of decisions, belong concurrently to the States and to the Federal government. All these powers, then, save as they were ac-

accompanied by express prohibitions to the States, appeared rather as strength given to Congress, than as limitations upon the autonomy of the State. True, the power over commerce among the States was granted in the same terms with the power over foreign commerce, and, taken literally, might be applied to the same extent, and yet it appears to have been understood that the two powers were of different nature; that the power to regulate foreign commerce was alone necessarily national in character, while the power to regulate commerce among the States grew out of the abuses of the importing States in taxing the non-importing, and was intended to be a remedial power given to the Federal government to prevent injustice and commercial war among the States.¹

It is remarkable, however, that so important a clause should be so briefly expressed, and leave so much to future determination.

By the Articles of Confederation, Congress had been given the "sole and exclusive right and power" of regulating trade with the Indians,² and it had been proposed in the Convention that these words should be retained in the Constitution, so that all the powers granted to the Federal government by the commerce clause should be in express terms "sole and exclusive." The motion was lost by a vote of six States to five,³ and the omitted words became doubly conspicuous in their absence.

The significance of this omission might perhaps receive additional force from consideration of the apparent care with which the authors of the Constitution had put into express terms the restraints upon State authority where restraint seemed necessary.

Mr. Chief Justice Taney gave utterance to this view in

¹Speech of Senator Morgan in Senate, May 28, 1890; 21 Cong. Rec. (part 6), pp. 5369, 5371, 5372. But see Letter of Madison to Cabell, Feb. 13, 1822.

²Article IX.

³Story on the Constitution (5th ed.), sec. 1067, n. 2.

the *Passenger Cases*,¹ where, referring to the thirty-second number of the *Federalist* as authority, he said that in those cases where it was thought that the powers given by affirmative grant to Congress should be exclusive, there had been most pointed care expressly to prohibit the exercise of such power by the States. "The grant of a general authority to regulate commerce, is not, therefore, a prohibition to the States to make any regulations concerning it within their own territorial limits not in conflict with the regulations of congress." It may be added, too, that certain acts which might be performed by the Federal government under this grant of power are in express terms prohibited to the States; such, for instance, may be the power to coin money,² which the States are in terms prohibited from doing.

In many respects the line of argument which was thus made against the exclusiveness of the Federal commercial power has received general support.

Logic and the necessity of events had not yet developed that sweeping and comprehensive prohibition which lay concealed in the general commerce clause,—a prohibition which has now become the most conspicuous feature of the Federal commercial power.

Early Construction of the Clause.—That this was the first view which generally obtained upon this subject appears from the earliest constructions placed upon this clause. In the opinion upon the United States Bank bill presented by Edmund Randolph, then attorney-general, to President Washington, on the 12th of February, 1791, in commenting upon the powers of Congress over commerce among the States, Mr. Randolph says that these powers "are little more than to establish the forms of commercial intercourse between the States, and to keep the prohibitions

¹ 7 How. 471.

p. 600. *Conf. Metropolitan Bank v.*

² Hare on American Constitutional Law, p. 114. See Letter of Madison in Appendix to Elliott's Debates (2d ed., Phila. 1876), vol. IV,

Van Dyke, 27 N. Y. 400, 502, 525; *United States v. Marigold*, 9 How. 560.

which the constitution imposes on that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another."

Even Alexander Hamilton, in his opinion upon the same subject, rendered to Washington eleven days later, while earnestly defending this provision of the Constitution as a substantial and extensive grant of power, nevertheless makes no reference to any consequent limitations upon the authority of the States.

The same appears also in the earliest action upon the subject. In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stage-coach engaged in transportation between Westfield, in Massachusetts, and Albany, in New York, for carrying passengers within the State of Connecticut in violation of a law of that State, which granted an exclusive right to the plaintiff to engage in such transportation.¹

In Maryland and Virginia also the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between States.² Furthermore, as showing the view of this matter in Congress, it is said that a motion was made in the second Congress to permit stage-coaches carrying the mails from State to State to transport passengers also, but that the motion was lost as being in violation of the rights of the States.³

Even in relation to foreign commerce the Federal power did not go unchallenged, for during the period in which Congress was prevented from prohibiting the slave trade, several States prohibited slave importation,⁴—a course of ac-

¹ *Perrin v. Sikes*, 1 Day (Conn.), 19.

² *McMaster's History of the American People*, vol. 2, p. 60. *Conf. Conway v. Taylor's Executor*, 1 Black, 603.

³ *McMaster's History of the American People*, vol. 2, p. 60.

⁴ *Schouler's History of the United States*, vol. 1, p. 144.

tion in which the Federal government apparently acquiesced. The House of Representatives, at least, claimed then nothing more for the United States than that it could regulate the treatment of slaves by citizens of the United States during their transportation into the States admitting them.¹

To the wide range of questions thus so early suggested, we find no answer in the express terms of the Constitution. Whether the commercial power which had been granted to Congress was to be exclusive of, or concurrent with, State action; whether it was to be subordinate or superior to the police or revenue powers of the States; whether, in short, it was to be everything or nothing,—all this was undetermined. The Federal authority as it exists to-day is the work of the national judiciary, and the decisions of the Supreme Court which mark its extent and its limitations would alone be the enduring monument of the greatness of the men who have sat upon the bench of that court, were their memory in all else gone.

The Constitutional Convention had met and adjourned. The Constitution which it framed had been adopted, and for thirty-five years no case involving the extent of this power arose in the Federal Supreme Court.

Growing Importance of the Clause.—Before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred forty-eight; while at the present time it is not less than two hundred and thirteen.

In the State courts and United States Circuit and District courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in forty-

¹ Annals of Congress, Feb. 11, 7th Cong., 2d Sess., 1802, 1803, p. 1563; March 23, 1790; Act of Feb. 23, Brig Wilson v. United States, 1 1803; 2 Stats. L. 205; Annals of the Brook. 423.

eight cases only. In 1860 the number had increased to one hundred sixty-four; in 1870 it was two hundred thirty-eight; in 1880 it was four hundred ninety-four; in 1890 it was eight hundred, while at the present time it is nearly fourteen hundred.

Such a history as this can, it is believed, find its parallel in no other branch of constitutional law. The explanation may perhaps be that in no other branch of constitutional law are so many conflicting interests arrayed against each other.

To this field has been transferred in large part the modern battle of States rights.

Here we find the struggle between classes and sections represented in resistance to Granger legislation, and the struggle between capital and labor represented in protection of carriers against violent interference with their operation.

More significant than all, we find here in the majority of cases the element of discrimination by one State against another, showing that the old Hellenic appetite, which found its satisfaction in the commercial chaos of the Confederation, has been neither extinguished nor slaked.

The judicial construction of the commerce clause by the Supreme Court of the United States begins with the case of *Gibbons v. Ogden*.¹

Gibbons v. Ogden.—This great case involved the validity of a law of the State of New York giving to Livingston and Fulton, and their assigns, the exclusive right to navigate the waters of that State by steamboats. On the part of the appellant it was contended that such a law was an attempt by the State to regulate commerce, and therefore in conflict with the exclusive right of the Federal government to make such regulations.

On behalf of the respondent it was urged that the Federal power over commerce, in the absence of Federal legislation, did not exclude State action, and furthermore, that, if a law

¹ 19 Wheat. 1.

passed by a State in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

Thus, eight years before the ordinance of South Carolina, the doctrine of nullification was presented to the Supreme Court.¹

In the opinion of the court, the supremacy of Federal authority, and the exclusive character of the national control of commerce, were clearly defined, and the rule then laid down is the established rule of the Federal courts to-day. In reading that momentous decision, apprehending, as we do now, the interests which were at stake, and with which the conclusion was pregnant, one cannot help pausing to wonder what might have been the result had that decision been in any way different from what it was. Had the utterance of the court upon the powers of the States been more ambiguous; had the expression upon the relation of the States to the Federal government been avoided, and the element of nationality involved been less explicitly disclosed and asserted; had it been allowed to cripple the commercial power of the nation in any way,—where would the influence of that decision have led us now? We may find some suggestion of an answer to these questions in the dissensions of the court in *New York v. Miln*, the *Passenger Cases*, the *License Cases*, and in the statement of Mr. Justice Barbour, that the police power of the State is “complete, unqualified, and exclusive.”

In *Gibbons v. Ogden*, Mr. Chief Justice Marshall said that the commercial power is a whole, incapable of division, and therefore exclusive of a like power in a co-ordinate sovereignty. The power to tax is an instance of a power which is, in its nature, divisible. “Taxation is the simple operation of taking small portions from a perpetually accumu-

¹See *Elkison v. Delieasseline*, 2 v. Tax Collector, 2 Bailey (S. C. Wheel. Cr. Cas. 56, decided by Mr. Law), 654, 674; *Smyth v. Ames*, 169 Justice Johnson in 1833. Conf. State U. S. 466, 171 U. S. 361.

lating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations or among the several States, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. . . . It has been contended by the counsel for the appellant, that as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted."

In this opinion Mr. Justice Johnson agreed, holding that "The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon. . . . The power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other, and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the

Union, the general government would be held responsible for them; and all other regulations but those which congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity.

"But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant."

Brown v. Maryland.—The next case upon the subject was *Brown v. Maryland*,¹ decided in 1827. This case involved the validity of a law of Maryland imposing a license tax upon importers for the privilege of selling imported goods. The power of Congress upon this subject, the court said, was not dormant, and it was not necessary to decide whether the mere existence of the commercial power in Congress excluded all action by the States, although the court indicated that it had not changed the views expressed in the previous case.

Congress had expressly authorized importation by imposing a duty upon the article which the plaintiff in error had sold. The right to import, the court said, involved a right on the part of the importer to sell, and any State law which imposed a tax upon the exercise of that right must be in collision with the Federal law, and therefore invalid.

"This argument," Mr. Justice Daniel said in the *License Cases*,² "involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely,—nay whose introduction is in effect invited and solicited by the federal government,—may be burdened by the States at pleasure."

The criticism would seem well made, if the court had not expressly stated in its opinion that "the power claimed by

¹ 12 Wheat. 419.

² 5 How. 616.

the State is in its nature in conflict with that given to Congress." Indeed, the express point decided in the case seems to rest upon the assumed fact that the commercial power was exclusive in Congress, even when dormant.

Willson v. Blackbird Creek Marsh Company.—Following these cases in 1829 came *Willson v. Blackbird Creek Marsh Company*.¹

This case involved the validity of a law of Delaware, authorizing the erection of a dam across Blackbird creek, a small stream wholly within the limits of that State. It was admitted that Congress had not legislated upon the subject, and therefore the very question was raised, upon which the court had expressed so definite an opinion, but which it had not been required to decide, in the two preceding cases. If the action of the State of Delaware was invalid, it was so because the dormant power possessed by Congress excluded all action whatever by the States.

The opinion, which was rendered by Mr. Chief Justice Marshall, is short, and without reference to the opinions which he had delivered in the previous cases. The court said:

"If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird

¹ 2 Pet. 245.

Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This opinion has met with widely-varying interpretations, and has been considered inconsistent with the views expressed in *Gibbons v. Ogden* and in *Brown v. Maryland*. The position which Mr. Chief Justice Marshall had taken in the previous cases was that the grant to Congress of the power to regulate commerce is exclusive because the power is itself a unit, incapable of division, and comprehends all foreign commerce and all commerce among the States;¹ or, as stated by Mr. Justice Strong, it was that the commercial power is so exclusively vested in Congress that no part of it can be exercised by a State.² It is plain, too, that the law of Delaware upon which the case arose, was a law which Congress might have passed in effectuation of its general commercial power; for, aside from the opinion, which seems clear upon this point, we have the statement of Mr. Justice Thompson, who was upon the bench at that time, that this law was so regarded.³

On the other hand, it is improbable that the court could have intended to disapprove of the argument in both of the earlier cases upon this subject in so brief a manner and without express reference to them. "There is not a man living, I suppose," said Mr. Justice Clifford in *Gilman v. Philadelphia*, "who has any reason to conclude that the constitutional views of the court had at that time undergone any change;"⁴ and ample confirmation of this view may be found in Mr. Justice Story's statement that Mr. Chief Justice Marshall agreed in his dissenting opinion in the case of *New York v. Miln*.⁵

The solution of the difficulty seems to lie in the fact, as

¹ *Gibbons v. Ogden*, 9 Wheat., at p. 194.

³ *New York v. Miln*, 11 Pet., at p. 149.

² *Case of the State Freight Tax*, 15 Wall. 232, 279.

⁴ 8 Wall., at p. 743.

⁵ 11 Pet. 161.

was suggested in the *Wheeling Bridge Case*,¹ that the statute in question was considered purely as a police regulation to reclaim the adjacent marshes for the benefit of the public health. While, therefore, the power of Congress over commerce must always be regarded as exclusive of such authority on the part of the States, the different purposes of statutes in question must mark the distinction between the powers brought into action.² The obvious suggestion was, therefore, made that as to the means which may be employed by the States in effectuation of their reserved powers, the exclusiveness of the Federal power is to some extent to be determined by the subjects upon which it operates, or that, so far as reasons exist, to make the national power exclusive, the court should so construe the constitutional provision; but that as the exclusiveness of this power depends not on any express prohibitions, but upon the reasons for its exercise, it should not extend beyond the reasons themselves.

The suggestion was, however, forgotten, and was not until the year 1851 made the express basis of a decision of the court.

* *New York v. Miln*.—The uncertainty produced by the decision in *Willson v. Blackbird Creek Marsh Company* is shown by the widely differing views entertained by the court in the next case,—that of *New York v. Miln*.³

The State of New York had passed a law requiring masters of all passenger vessels from other States or foreign countries to make a report to the State authorities within twenty-four hours after their vessels had arrived, giving information as to the passengers which their vessels had carried upon the voyage. The constitutionality of this act was questioned, as a regulation of foreign and interstate commerce.

The court held that the act was valid, as an exercise of the police power, and not a regulation of commerce.

¹ 13 How., at p. 566.

³ 11 Pet. 102; *Miln v. Mayor of*

² *Gibbons v. Ogden*, 9 Wheat. New York, 2 Paine, C. C. Rep. 420. 235.

To this point the court expressly limited the decision, and refused to pass upon the question whether the commercial power in Congress is itself exclusive of State action, although this subject was fully argued at the bar. Upon this question, we are informed, great diversity of opinion existed upon the bench.¹ In the *Passenger Cases*,² Mr. Justice Wayne made the statement that four of the judges considered the constitutional grant exclusive; three thought otherwise; and that it was to this disagreement among the members of the court that the disclaimer in the opinion was due.

Mr. Justice Barbour, however, in his opinion, went far beyond the point he professed to decide. His early and strongly national views were forgotten and abandoned. He justified the act as an exercise of the police power reserved to the States, and which is itself "complete, unqualified and exclusive,"—a phrase which Mr. Justice Grier afterward quoted as authority for his remarkable position in the *License Cases*. Whether the power granted to Congress be exclusive or not, said Mr. Justice Barbour, it includes only the power to legislate for the purpose of regulating commerce. Means which may be employed by the States for other purposes may never, by an exclusive grant of a power to Congress, be prohibited to the States, unless in actual conflict with Federal legislation.

In the dissenting opinion of Mr. Justice Story we find a return to the arguments of the court in the case of *Gibbons v. Ogden*, an opinion which Mr. Justice Story said had the entire concurrence of Mr. Chief Justice Marshall, and which shows that he never intended to overrule the position which he had taken in that case.

"Full power to regulate a particular subject implies the whole power, and leaves no residuum; and a grant of the whole to one, is incompatible with a grant to another of a part." Further than this, he said, it is one question whether a means be adapted to serve the State in the exercise of its

¹ See 5 How., at p. 584; 7 How., at pp. 423, 425, 430. ² 7 How. 423.

reserved powers, and quite another question whether such means be within the competency of the State. An exclusive grant of power to Congress may necessarily deprive the State of some means to enforce its reserved powers, because the power of the State does not extend to the employment of those means.

The License Cases.—In *Pierce v. New Hampshire*,¹ one of the License Cases decided in 1846, the question expressly reserved in the Miln case came directly before the court for decision.

A barrel of gin being bought in Boston, transported to New Hampshire and there sold without the license which the latter State required for the privilege of selling spirituous liquors, and the seller being indicted therefor, the defense was raised that the law was unconstitutional so far as affected vendors of merchandise brought from another State. It was admitted that Congress had passed no law bearing directly upon this subject, and that if the State law was unconstitutional, it was so because in conflict with the dormant commercial power of Congress.

Six justices delivered separate opinions in this case, but all reached the conclusion that the New Hampshire law was a valid exercise of the authority of the State.

Mr. Chief Justice Taney and Justices Catron and Nelson were of the opinion that the statute was a regulation of interstate commerce, but yet valid so long as it was not in conflict with any legislation of Congress, and endeavored to harmonize their conclusions with the argument of the court in *Gibbons v. Ogden* and *Brown v. Maryland*.

Mr. Justice Daniel, disregarding *Brown v. Maryland*, held that the right to import did not include the right to sell.

In the opinion of Mr. Justice Grier is heard for the first time from the bench the argument which had been presented to the court by counsel in *Brown v. Maryland*, and in the Miln case, an argument which had been discredited by Mr.

¹ 5 How. 504, 13 N. H. 536.

Chief Justice Marshall and denied by Mr. Justice Story, that the authority of a State, in the exercise of its reserved powers, is "complete, unqualified and exclusive," and that the exigencies of the social compact require that the police laws of the State be executed before and above all others.

Mr. Justice McLean alone affirmed in his opinion that the dormant commercial power of Congress excludes all State action.

Mr. Justice Woodbury took a middle course, and, for the first time in the history of the court, formulated the modern rule.¹ In several respects, he said, the power granted is not in its nature more exclusive of action on the part of the States than are other powers granted to Congress. So far as regards the uniformity of a regulation reaching to all the States, the commercial power "must of course be exclusive," but in many local matters it not only permits but requires the concurrent and auxiliary action of the States.

"There is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by congress conflicting with it. Such are the deposit of ballast in harbors, the extension of wharves into tide water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds." (Page 624.)

The Passenger Cases.—The question next came before the court in the *Passenger Cases*.²

These cases arose upon laws of New York and Massachusetts imposing a tax upon all passengers arriving from other

¹In *Bowman v. The Railroad Co.*, 125 U. S. 481, Mr. Justice Matthews erroneously gives to, Mr. Justice Curtis the credit of having first clearly stated this rule in *Cooley v. Port Wardens*, 12 How. 810. ²7 How. 282; *Norris v. Boston*, 4 Met. 282.

States or foreign countries; the proceeds to go, first, to pay the State expenses of executing its police laws excluding paupers and convicts, and the surplus, if any, to be applied to State purposes.

The decision of the court, four justices dissenting, was against the constitutionality of the State laws.

Mr. Justice McLean based his decision on the ground that the Federal commercial power was exclusive; the four other justices, constituting a majority of the court, saying that they did not consider it necessary in these cases "to re-affirm what this court has long since decided, that the constitutional power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, is exclusively vested in congress, and that no part of it can be exercised by a State." (Page 411.)

In his dissenting opinion in these cases, Mr. Justice Woodbury repeated the distinction which he had made in the *License Cases*.

In his opinion, the subject upon which New York and Massachusetts had legislated was in its nature local, neither requiring nor being capable of uniform regulation throughout the country.

"When I say much was left, and meant to be left, to the States in connection with commerce, I mean concerning details and local matters, inseparable in some respects from foreign commerce, but not belonging to its exterior or general character, and not conflicting with anything congress has already done." . . . "So far as reasons exist to make the exercise of the commercial power exclusive, as on matters of exterior, general, and uniform cognizance, the construction may be proper to render it exclusive, but no further, as the exclusiveness in this case depends wholly on the reasons, and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear the exclusiveness should halt. In such case, emphatically, *cessante ratione, cessat et ipsa lex*." ¹

¹ 7 How., at p. 559.

"There is nothing in the nature of much which is here connected with foreign commerce that is in its character foreign, or appropriate for the action of a central and single government; on the contrary, there is matter which is entirely local,—something which is seldom universal, or required to be either general or uniform. For though congress is empowered to regulate commerce, and ought to legislate for foreign commerce as for all its leading incidents and uniform and universal wants, yet 'to regulate commerce' could never have been supposed by the framers of the constitution to devolve on the general government the care of anything except exterior intercourse with foreign nations, with other States, and the Indian tribes."¹

"For the silence of congress, which some seem to regard as more formidable than its action, is, whether in full or in part, to be respected and obeyed only where its power is exclusive, and the States are deprived of all authority over the matter. The power must first be shown to be exclusive before any inference can be drawn that the silence of congress speaks." . . . "In other cases where the power of congress is not exclusive, and that of the States is concurrent, the silence of congress to legislate on any mere local or subordinate matter within the limits of a State, though connected in some respects with foreign commerce, is rather an invitation for the States to legislate upon it."²

Cooley v. Port Wardens.—In *Cooley v. Port Wardens*,³ the next case involving this question, the distinction made by Mr. Justice Woodbury in the *License and Passenger Cases* was adopted as the rule of decision. In delivering the opinion of the court Mr. Justice Curtis said:

"The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the

¹ 7 How., at pp. 557, 558.

² 12 How. 310, 319.

³ 7 How. 559.

power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part."

Final Statement of the Rule as to Exclusiveness.—The distinction thus involved in Mr. Chief Justice Marshall's decisions, originally formulated and definitely expressed by Mr. Justice Woodbury, and authoritatively adopted by the court in the opinion of Mr. Justice Curtis, has now become the well-settled rule of the Federal courts. The States may establish port regulations, regulations of pilotage, may improve their harbors and rivers, erect bridges and dams, and exercise many other local powers. In the exercise of its proper authority, a State may enact laws providing for the inspection of goods, to determine whether they are fit for commerce, and to protect the citizens and the market from fraud. But in all such cases, as was said in *Leisy v. Hardin*, though the States may exercise powers which may be said to partake of the nature of the power granted to the general government, they are strictly not such, but are merely local powers, which have full operation until circumscribed by the action of Congress in effectuation of the general power.

In matters admitting uniform regulation throughout the country and affecting all the States, the inaction of Congress is to be taken as a declaration of its will that commerce shall

be "free and unrestricted" so far only as concerns any general regulation by the States. It can hardly be considered that this phrase means more than freedom from such regulations as admit of uniformity, for it is only to this extent that the jurisdiction of Congress over interstate commerce is exclusive of State regulation.¹

On the other hand, in matters of local nature, such as are auxiliary to commerce rather than a part of it, the inaction of Congress is to be taken as an indication that for the time being, and until it sees fit to act, they may be regulated by State authority.

Since the decision of *Cooley v. Port Wardens*, the rule therein laid down has, with one important exception which will be hereafter noticed,² been followed in every case in the Supreme Court upon this subject. It is perhaps the most satisfactory solution which has ever been given of this vexed question,³ and "may be considered as expressing the final judgment of the court."⁴

It is not easy at this time to exaggerate the importance of the case by which this rule was established.

¹ See 4 Harvard Law Rev. 224.

² *Post*, p. 164.

³ *Crandall v. Nevada*, 6 Wall. 35, 42.

⁴ *Mobile v. Kimball*, 102 U. S. 691, 702; *Bowman v. Railroad Co.*, 125 U. S. 465, 507; *Bridge Co. v. Kentucky*, 154 U. S. 204; *Leisy v. Hardin*, 185 U. S. 100; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Telegraph Co. v. Pendleton*, 122 U. S. 347; *Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *Robbins v. Taxing District*, 120 U. S. 489; *Wabash, etc. R. R. Co. v. Illinois*, 118 U. S. 557; *Walling v. Michigan*, 116 U. S. 446, 455; *Brown v. Houston*, 114 U. S. 622; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Cardwell v. Bridge Co.*, 113 U. S. 205, 210; *Transportation Co. v. Par-*

kersburgh, 107 U. S. 691, 701, 702; *Escanaba Co. v. Chicago*, 107 U. S. 678, 687; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Tiernan v. Rinker*, 102 U. S. 123; *Hall v. De Cuir*, 95 U. S. 485; *Railroad Co. v. Husen*, 95 U. S. 465; *Pound v. Turck*, 95 U. S. 459; *Foster v. The Master, etc. of the Port*, 94 U. S. 246; *Henderson v. Mayor, etc.*, 92 U. S. 259, 272; *Welton v. Missouri*, 91 U. S. 275; *Case of State Freight Tax*, 15 Wall. 232, 279; *Ward v. Maryland*, 12 Wall. 418; *Hardy v. Railroad Co.*, 32 Kan. 698; *Master, etc. of Port of New Orleans v. Ship "M. J. Ward,"* 14 La. Ann. 287; *Commonwealth v. Huntley*, 156 Mass. 236; *Lumberville, etc. Co. v. State Board*, 55 N. J. L. 529.

It offered a logical principle for the construction of the constitutional provision, such as no previous case had offered. More than this, it marked, in 1851, the end of the struggle, lasting more than thirty years, and which had been begun in *Ogden v. Gibbons*, in the New York courts.

Like the latter case, which had called out the early announcement of the principles of nullification, this case, too, occupies a place in political history, for it was followed in 1854 by that ringing declaration of the principles of secession which is to be found in the fourteenth volume of the Georgia Reports, in the case of Padelford and others against the Mayor of Savannah,¹ a declaration which closed with the significant statement that, in matters of dispute between a sovereign State and the Federal government, a citizen who considered himself injured by a Federal statute should look to his State for protection. It is that sovereign's business, said the court, to get enough from the offending sovereign to cover all private losses of its own citizens, and if it do not, these citizens must look to it alone for indemnity.

Difficulty of Applying the Rule.—And yet the case of *Cooley v. Port Wardens* has had its largest effect in the theory of the law.

We read in Blackstone of a statute, made with great deliberation, and introduced in the most solemn manner, which has, owing to the construction placed upon it, had little other effect than to make a slight alteration in the formal words of a conveyance. To a certain extent the same sort of comment might also be made upon the rule laid down in *Cooley v. Port Wardens*; for, with little change in its practical aspects, the battle which before this time had been fought over the exclusiveness of the Federal power, now wages about the rule announced by this decision, and is decided upon the circumstances of each case by the determination whether the power in question is local in its nature, or is one which necessitates a general rule capable of uniform application.

¹ 14 Ga. 488.

In making this determination, it was held, in *Mobile v. Kimball*, that the controlling purpose of this clause of the Constitution was to secure commerce among the States from conflicting or discriminating State regulations,¹ and that its application must be made in the light of this purpose. In every case, therefore, the principal test of the constitutionality of State legislation was found in the questions whether the statute was discriminating or would tend to produce conflict of regulations.

In very many cases the legislation involved has been of a discriminating character; but in tracing the history of the rule it must be remembered that discrimination is not all that is forbidden by the commerce clause, nor is the question of its existence the only test by which the validity of State legislation is to be determined.

It is not impossible, however, that the most far-reaching effect produced by the clause has been the prevention of wars of commercial discrimination among the States. The impulse in this direction has shown itself so strong, that since the adoption of the Constitution there has never been a period when there was not to be found on the statute books of some of the States acts passed in violation of this provision of the Constitution.²

Another and perhaps as good an illustration of the strength of the theories of "protection," as applied among the States, is found in the fact that, since it has been recognized that insurance is not included in the term "commerce," so as to be within the protection of this clause of the Constitution, two-thirds of the States have pursued a policy of discrimination, restriction and retaliation towards the insurance companies of other States.

Modern instances of the earnestness underlying this ever-

¹ *Mobile v. Kimball*, 102 U. S. 691, 697; *Veazie v. Moor*, 14 How. 568, 574; *The Federalist*, Nos. VII and XI; *State v. Emert*, 103 Mo. 241. ² Memorial Oration of Mr. Justice Miller, 135 U. S., Appendix.

smouldering commercial war — instances such as that of boycott, with which Governor Gordon of Georgia, and the Atlanta Constitution, proposed some years ago to meet the advocates of the Lodge “Force Bill” — might be so multiplied by a careful observer that this clause of twenty-one words might perhaps be called the peace-maker of the States, or perhaps not inaptly compared to the inch of timber that floats the ship, or the half inch of steel that guides the train.

The Purpose of the Clause as a Test.— The rule announced in *Mobile v. Kimball* has been found, however, in actual application, to present grave difficulties. Discrimination or conflict in commercial regulations must, of course, always come within the constitutional prohibition, but it is often exceedingly difficult to determine whether they exist.¹ The widely-varying character of trade in different parts of the country, and the ingenuity and persistency with which the States have sought to take advantage of this element to protect their domestic trade under the guise of uniform taxation or regulation of police, has seemed to necessitate a stricter rule.

An instance of the difficulty thus encountered is found in the case of the *State Freight Tax*,² which involved a law of Pennsylvania laying a tax on every ton of freight carried within the limits of the State. No distinction whatever was made between domestic and interstate traffic, and yet, as was pointed out in the able argument against the tax, the citizens of that State could well afford to submit to a commercial regulation which taxed for their benefit the millions of tons of freight which are transported through or from their State. “A regulation of commerce which taxes the vast tonnage of the great thoroughfares which traverse the State from east to west and from north to south; which taxes the tonnage of the Pennsylvania, of the Erie, of the

¹ See dissenting opinion of Mr. Justice Nelson in *Woodruff v. Parham*, 8 Wall. 123, 140.

² 15 Wall. 232, 237.

Lake Shore, of the Philadelphia, Wilmington, and Baltimore, and other railroads over which freight is transported, through or from the State; which compels foreign consumers of coal, and the other mineral products of Pennsylvania, to pay tribute for the privilege of having them transported, either by natural or artificial channels, by rivers or by railroads, is not likely to be considered oppressive by the people of Pennsylvania. A State through whose territory a single line of railroad passes would not hesitate to regulate railroad commerce without discriminating in favor of its own domestic commerce, if the regulations proposed would render the commerce of a continent tributary to its treasury. The steamboat traffic of the Mississippi would be a tempting subject for the commercial regulations of the several States within whose boundaries it is carried on. None of the evils which induced the framers of the Constitution to invest Congress with the power of regulating commerce between the States would be avoided under such an interpretation of the Constitution."

In the case to which reference has been made, the law in question was not sustained, but in the decisions as to the validity of State taxation upon commercial travelers there have been different judgments.

Such taxation, when imposed upon all commercial travelers doing business within a State, was for a time sustained. Being uniform in its operation, it could hardly, in the ordinary meaning of the word, be called discriminating; and yet it is easy to perceive that the effect of such a tax would be unfavorable to the trade of other States, and that this consideration could not have been overlooked in the legislatures of the several States by which such statutes have been enacted.¹

The Widening Scope of the Clause.—It was in this class of cases, therefore, that in 1886 we find the rule at last

¹For an example of this see *Ex Agriculture*, 43 Fed. Rep. 609, 612, *parte Hanson*, 28 Fed. Rep. 127. 618.
Conf. Fertilizing Co. v. Board of

abandoned. That discrimination against other States does not exist, it is now said, "does not meet the difficulty." Interstate commerce "cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or on that which is carried on solely within the State." Behind the shield of the Federal commercial power the States do not exist, or, in the brief, emphatic language of Mr. Justice Bradley, "in the matter of interstate commerce the United States are but one country."¹ And following this important decision, like an echo of the ringing challenge from the Supreme Court of Georgia thirty-two years before, came the declaration of the Court of Appeals of Texas in *Ex parte Asher*,² that they do not feel bound by this decision, and, not believing it to be the law of the land, will not consider it of binding force. The Robbins case is disapproved.

Following this decision, one year later came the important case of *Bowman v. Railroad Co.*,³ in which it was held, the Chief Justice and Justices Harlan and Gray dissenting, that the question whether an article is or is not a subject of commerce is to be determined by the usages of the commercial world, and does not depend upon the declaration of any State. In this case the question concerned the right of the

¹ Robbins v. Taxing District, 120 U. S. 489, 494. See Stockton v. Railroad Co., 82 Fed. Rep. 9, 17.

"It is observable that Mr. Jefferson, in his letter of March 15, 1789, says: 'This instrument (the Constitution of the United States) forms us into one State, for certain objects,' etc. In a number of other places, if I mistake not, he speaks of the Constitution as making us one people and one nation for certain purposes." Letter of Madison to Prof. Tucker, July 6, 1833. The James Madison Letters (N. Y., 1884), vol. 4, p. 808.

"I have heard with great pleas-

ure that our Assembly have come to the resolution of giving the regulation of their commerce to the Federal head. I will venture to assert that there is not one of its opposers, who, placed on this ground, would not see the wisdom of this measure. The politics of Europe render it indispensably necessary that with respect to everything external, we be one nation only, firmly hooped together. Interior government is what each State should keep to itself." Letter of Jefferson to Madison from Paris, Feb. 8, 1786.
² 28 Tex. App. 662.

³ 125 U. S. 465.

railroad company to carry liquor into Iowa, notwithstanding the prohibition laws of that State. There was no suggestion of discrimination on the part of Iowa adverse to other States, but it was said by the court, quoting the opinion of Mr. Justice Catron in the *License Cases*, that if the State could thus take an article from commerce, its power over interstate commerce would be superior to that of Congress, in whom the Constitution has vested it. Upon the theory that Congress may regulate, but the State may determine what shall or shall not be regulated, the power to regulate commerce, instead of being paramount over the subject, would be subordinate to the police power.

This decision has the approval of a majority of the court in the recent cases of *Leisy v. Hardin*¹ and *Lyng v. Michigan*.²

The fact of the adoption of the absolute rule stated in the Robbins case shows in its clearest light the great difficulty which attended the application of the rule, which construed the clause by its purpose, and yet it is certain that in many cases the absolute rule has proved impossible of application, and has been substantially modified by recent decisions, as will be shown. Its principal defect from a practical standpoint has been that, instead of establishing equal rights for all, it established in every State a discrimination against the citizens of that State in favor of those who were engaged in interstate commerce.

Change in Theory of Constitutional Construction.—It is at this point that the striking result of the progress of constitutional interpretation since the case of *Cooley v. Port Wardens* becomes most conspicuous,—a result which may be summarized in the statement that that which it is as to other instruments the sole object of interpretation to discover and apply—the intention of the makers—has been, as to constitutional interpretation, not only modified, but its

¹135 U. S. 100.

²125 U. S. 161.

application in special circumstances may be said, as in the *Leisy* and *Bowman* cases, to have been fairly disapproved. The construction of the commerce clause cannot be limited to the accomplishment of the particular objects which the framers of the Constitution sought, but must broaden with the extending needs of commerce, so as to accomplish wider purposes. The words of the Constitution still remain, and the purpose to protect national and international commerce from burdensome, conflicting or discriminating State legislation still remains; but the application of the clause to particular conditions is changed. In the course of time, and in greater or less degree, such must be the result of the interpretation of any written Constitution.

"No instrument can be the same in meaning to-day and forever, and in all men's minds. Its interpretation must take place in the light of the facts which preceded and led to it; in the light of contemporaneous history, and of what was said by the actors and the ends they had in view. And as men will differ upon facts and differ in mental constitution, so they will differ in interpretation; and in the case of a written constitution, the divergencies are certain to increase when it comes to receive practical application. And if at any time the people are subjected to a great constitutional crisis, they are not thereafter precisely the same in ideas, sentiments, desires, hopes, and aspirations that they were before: their experience works changes in their views and in their habits of thought, and these may be so radical that they seem altogether a new people. But as the people change, so does their written constitution change also: they see it in new lights and with different eyes; events may have given unexpected illumination to some of its provisions, and what they read one way before they read a very different way now. Then the logic of events may for all practical purposes have settled some questions before in dispute; and nobody, in his contemplation of the constitution, can separate it if he would from the history in which its important provisions

have had a part, or be unaffected in his own views by that history.”¹

There comes a time, then, in the interpretation of a written constitution, when the rules which are applied to other instruments are no longer the only guides to its interpretation; a time when its history is of more importance than its origin; when the intention with which it was framed and adopted can no longer alone control in its application.

The Application of the Doctrine of State's Rights.—This point was reached in the interpretation of the Constitution when the issue of the Civil War had finally established, on a new basis, the relations between the States and the Federal government. We pass from the old regime to the new, not by the slow processes of judicial construction, but at a single step, as the national sovereignty which the war established as a fact is given place in the constitutional law of the nation by the decisions of the court.

Throughout their development the principles which the war established were political rather than judicial. American constitutional history, until after the war, was largely a struggle between the broader commercial interests of the nation and the slave interests of the South. Throughout this period, in everything that was said, whether upon the commerce clause, upon internal improvements, upon the United States Bank, or upon any subject of constitutional construction broached, the mark of Southern slavery may be seen over all; and, as Professor Von Holst has said, when the slave power lost hope of becoming the national power, the necessity which required that it should dominate wherever it existed made it particularistic and exclusive. It was in this fact that Calhoun's theories of the Constitution found their origin. Grant once a national power of commercial regulation, and no State can exclude its operation. That the interests of slavery forbade its admission can be shown in no

¹ “Michigan,” by Judge Cooley, in *Am. Commonwealth Series*, p. 846.

stronger light than is thrown upon it in the long standing dispute which led to, and followed, Mr. Samuel Hoar's mission from Massachusetts to South Carolina in 1844.¹

Calhoun's doctrine that the United States Constitution created no nation; that the government which it established was Federal as distinguished from National, "because it is the government of a community of States, and not the government of a single State or nation,"² found, therefore, immediate application in the construction of the commerce clause. Its influence may be seen throughout the course of the decisions of the Supreme Court before the Civil War, and, although it had the distinct disapproval of that court, it was a doctrine which no decision could overthrow.

Effect of the Overthrow of this Doctrine.—Among the many constitutional changes which the Civil War produced, it may perhaps be said that none is so great as that in the construction of the Federal commercial powers effected by the disappearance of this theory. In *Crandall v. Nevada*³ may be found the substance of what was accomplished by that great struggle. All the triumph of the armies of the Union breathes in its stately judgment that "the people of these United States constitute one nation."

In 1844 South Carolina asserted the power to exclude citizens of other States from her territory. In 1865 Nevada laid a tax upon persons leaving or passing through the State. The difference between these statutes is one of detail. Both alike assert the jurisdiction of the State over interstate travel. Such jurisdiction, the court said, is inadmissible, not alone

¹ *Elkison v. Delisseline*, 2 Wheel. Cr. Cas. 56; Report No. 80, House of Representatives, 27th Cong., 3d Session; Wilson, *Rise and Fall of the Slave Power in America*, vol. I, p. 578; *The Cynosure*, 1 Sprague, 88; *The Ship William Jarvis*, 1 Sprague, 485; *The Wilson*, 1 Brock. 423; *Validity of the South Carolina Police Bill*, 1 Op. Atty. Gen. 659, 2 id. 426. Conf. also *Baker v. Wise*, 16 Gratt. 189.

² Calhoun's Works, vol. I, p. 113.

³ 6 Wall. 35, reversing *Ex parte Crandall*, 1 Nev. 294. Conf. Op. C. J. Taney in *Smith v. Turner*, 7 How. 283, 464.

because forbidden by one or two clauses of the Constitution, but because at variance with the spirit of the whole instrument.

The government of the United States has the right to call for the service of its citizens wherever within its territory it may need them. If the exercise of this right were dependent upon the pleasure of a State, it would be within the power of that State to prevent administration of the Federal government within its limits and seriously to embarrass its operation in other places. If, for example, Tennessee had been able, during the Civil War, to levy a tax on every person entering or leaving the State, the treasury of the United States would not have been sufficient to pay the tax necessary to enable its armies to pass through the State.

As the Federal government has the right to maintain its operation throughout the whole territory which it covers, so every citizen of that government has the right of appeal to it wherever it exists. He has a right of access to its capital, its seaports, sub-treasuries, land offices and courts, and this right is independent of the will of any State over whose soil he must pass in its exercise.

It was a long step toward a new establishment of commercial powers when this opinion was rendered,—a step toward the creation of powers which should be free from the restrictions with which the South had, until the war, endeavored to check the national expansion of the Constitution, and yet *Crandall v. Nevada* in terms applied only to interstate travel. It remained for the case of the *State Freight Tax*,¹ in 1872, to extend the same rule to the transportation of merchandise from State to State. The *Crandall* case held, it is said, “that a State cannot tax persons for passing through or out of it. Interstate transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State

¹ 15 Wall. 232, 281.

tax upon the carriage of merchandise from State to State in conflict with the Federal Constitution."

It is probably true, as has often been said, that the *Crandall* case stood alone, at the time of its decision, in the method of construction which it applied to the Constitution; but since that time its influence may be seen in many decisions of the Supreme Court upon the Federal commercial powers.

Two years after this case came the Fourteenth Amendment, adopted in 1868, providing that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fundamental rights of the citizen, including the right of travel and transportation and the right to engage in commerce,¹ are by this amendment put within the protection of the Federal Constitution.

This provision includes, within the wide field of its operation, much of the ground covered by the clause of the Constitution which gives to citizens of each State the privileges and immunities of citizens of the several States.² It was considered at an early day that among the rights thus secured are "the right of a citizen of one state to pass through, or reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise;" . . . "to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by other citizens of the States."³

The radical differences in the social systems of the different States before the Civil War, and the extent to which the

¹ *Joseph v. Randolph*, 71 Ala. 499;

² Art. IV, sec. 2.

Ward v. Maryland, 12 Wall. 418, 480; *Allgeyer v. Louisiana*, 165 U. S.

³ *Corfield v. Coryell*, 4 Wash. C. C. 371, 381.

578. *Conf. Sheppard v. Commissioners of Sumter County*, 59 Ga. 535.

doctrine of State sovereignty was established, led to a practical repudiation of this provision of the Constitution. Some free citizens of Northern States were denied the right to enter Southern States, and the Southern planters coming North with their slaves found that in the North their property right was denied. This collision was inevitable. A provision giving to citizens of each State the rights of citizens of all the other States can only be effectual when the rights of citizens of the several States are substantially similar. Such a clause cannot give in Illinois to a citizen of Alabama rights which Illinois lawfully denies to her own citizens.¹

The great social and political change which resulted from the war made necessary, among other constitutional changes, some reinstatement in the Constitution of the clause which secured equal rights to all citizens; and this was done by the Fourteenth Amendment.²

From the foregoing review, it appears that the Federal power over commerce arises in three ways:

First, from the express provisions of the Constitution relating to commerce, including the commerce clause and other grants of power upon related subjects.

Second, from the whole Constitution as construed in the case of *Crandall v. Nevada*,³ and the case of the *State Freight Tax*.⁴

Third, from the clause of the Constitution which gives citizens of each State the rights of citizens in the several States, and from the Fourteenth Amendment.

Difference Between the Three Grants of Power.—The ground covered by each of the three grants of power thus made is somewhat different.

The Federal power over travel and transportation, resulting from the construction of the Constitution in *Crandall v.*

¹ See *Lemmon v. People*, 26 Barb. June 5, 1866, Congressional Globe, 270; 20 N. Y. 562. 1st Sess. 39th Cong., pt. 4, p. 2961.

² See Speech of Senator Poland, ³ 6 Wall. 85.

⁴ 15 Wall. 232, 231.

Nevada, is based upon rights and duties of citizens and of the government; and while it appears to have been extended over transportation conducted by corporations,¹ and would doubtless protect all persons, whether citizens or aliens, nevertheless the argument concerns only the rights and duties of citizens and of the Federal government.

The Fourteenth Amendment, and the article in the Constitution which preceded it, protect also the rights of citizens, although the amendment goes beyond the provision of the article in securing to all persons within the jurisdiction of a State, whether citizens, corporations or aliens, the equal protection of the laws.² Neither of these grants of power is necessarily commercial in its nature, nor, so far as it concerns travel and transportation, is it limited in its operation to the transportation which crosses State lines.

It is the intention in this work to consider only the Federal power which arises from the commerce clause, taking into view other constitutional powers only so far as they fall within and operate upon the ground covered by that clause.

Difference Between Foreign, Indian and Interstate Commerce.—In considering the Federal power derived from the commerce clause, it should be noticed that the Federal jurisdiction over the three branches of commerce differs widely in nature and extent.

Interstate commerce is national, while foreign commerce is international in character. Over interstate commerce the powers of the Federal government are not limited by any other governmental authority, while over foreign commerce Federal power is necessarily limited by the equal power of the foreign government.³

¹ *Case of the State Freight Tax*, 15 Wall. 232, 281.

² *Smyth v. Ames*, 169 U. S. 466, 171 U. S. 361; *Covington, etc. Turnpike Co. v. Sandford*, 164 U. S. 578, 593; *Railroad Co. v. Beckwith*, 129 U. S. 26; *Railway Co. v. Mackey*,

127 U. S. 205; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Santa Clara v. Railroad Co.*, 118 U. S. 394; *Stockton v. Railroad Co.*, 82 Fed. Rep. 9.

³ *United States v. Knight*, 8 Int. Com. Rep. 801.

In interstate commerce the power of the Federal government is always limited by the constitutional rights of citizens, while in foreign commerce conducted by aliens these limitations do not always appear.

The Federal control over commerce with the Indian tribes is of a different character, and has been exercised to an extent which would be impossible in either foreign or interstate commerce.

The power over these three branches of commerce being granted in the same clause and in the same terms might, if taken literally, be understood as being of the same character and extent. It does not appear, however, that this was the intention of the framers of the Constitution,¹ and certainly the history of the exercise of these powers emphasizes the necessary difference between them.

¹Speech of Senator Morgan, Cong. to Cabell, Feb. 13, 1829; The James Congressional Record, May 28, 1890. Madison Letters, vol. 4, p. 14. Conf., however, Letter of Madison

CHAPTER II.

DEFINITIONS OF COMMERCE.

Commerce, as the word is used in the Constitution, has received the broadest definition.

It includes not only traffic, but every species of commercial intercourse among the States.¹ It "is a term of the largest import," and "includes intercourse for the purposes of trade in any and all its forms."²

"In Webster's Unabridged Dictionary 'commerce' is defined as 'the exchange of merchandise on a large scale between different places or communities.' This embraces two distinct ideas: First, that of exchange in its largest sense, including barter,—the giving of one commodity for another; and sale,—the exchange of an article of property for money, the representative of all values. From this definition it will be seen that there can be no commerce unaccompanied by exchange or sale. The other idea embraced in the definition is that of transportation; for, to constitute commerce, the exchange must be between different places or communities; and any law that either prevents the transportation or sale of merchandise totally destroys commerce by the exercise of that power alone. Commerce, then, involves the idea of carrying the commodity intended for exchange to another place, where, as we may say, the market is to be held, and the sale accomplished. Hence, without both transportation and liberty of sale, there can be no interstate commerce."³

¹ Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 190, 194. *ball*, 102 U. S. 702; *Kidd v. Pearson*, 126 U. S. 20; *Case of State Freight*

² *Welton v. Missouri*, 91 U. S. 280. *Tax*, 15 Wall. 275; *Corfield v. Cor-*
As to the word "intercourse," see 7 *yell*, 4 Wash. C. C. Rep. 379; *Erie*
How. 492, 517. As to the word "com- *R. R. Co. v. State*, 2 Vroom, 531.

merce," see 7 How. 501. For an- ³ *Harvey v. Huffman*, Circ. Ct.
other definition, see *Mobile v. Kim-* *Porter Co., Ind.*, cited in 80 Fed.

Transportation an Essential Element.—Commerce is the interchange of goods or property of any kind between nations or individuals. Transportation is the means by which commerce is carried on; without transportation there could be no commerce between nations or among the States.¹

In every case which has been held to be within the constitutional grant to Congress, actual transportation, either of persons or property, appears to be the characteristic of foreign commerce and of commerce among the States.²

Transportation for Other Purposes than Trade.—It has already been shown that the right of travel and transportation is one of the rights of citizenship protected by the Federal Constitution. The right to navigate public waters of the United States is secured by the admiralty jurisdiction, without reference to the purpose for which the navigation is conducted;³ and the right of free movement, whether by land or water, is one of the elements of personal liberty secured by the Fourteenth Amendment.

It follows, therefore, that the Federal power extends over all travel and transportation among the States, whether conducted for purposes of trade or not, and to a certain extent protects also the travel and transportation which is within the limits of a single State.

The extent to which this protection goes varies somewhat with the circumstances of each case. There may be instances of a mechanical crossing of State lines in which the

Rep. 646, 648; *United States v. Cassidy*, 67 Fed. Rep. 698, 705.

¹ *Steamship Co. v. Pennsylvania*, 122 U. S. 326-339; *Council Bluffs v. Kansas City, etc. R. R. Co.*, 45 Iowa, 338.

² Von Holst, *Const. Law of U. S.*, p. 138; *United States v. E. C. Knight Co.*, 156 U. S. 1; *Philadelphia, etc. S. Co. v. Pennsylvania*, 122 U. S. 830; *Railroad Co. v. Husen*, 95 U. S. 465,

470; *Erie R. R. Co. v. State*, 2 Vroom, 581; *Wells, Fargo & Co. v. Northern Pacific Ry. Co.*, 28 Fed. Rep. 469, 476; *State v. Indiana, etc. Co.*, 120 Ind. 575; *Board of Railroad Commissioners v. Railroad Co.*, 22 S. C. 220; *People v. Raymond*, 84 Cal. 492; *Council Bluffs v. Railroad Co.*, 45 Iowa, 338.

³ *United States v. Ferry Co.*, 21 Fed. Rep. 382.

act of transportation is so purely incidental, and auxiliary to other purposes, that the relation to commerce is slight. Such, for instance, in some of its aspects, was the *Kansas City Stock Yards* case.¹ In this case the stock yards were located on both sides of the State line, and in the handling of stock some were driven across the line, and perhaps returned again, as might be convenient for watering, feeding or removing from the pens. Even in this case the transportation was undoubtedly within Federal protection. Neither State in which the yards were partially located might prohibit the company from so using its property, or from driving the cattle back and forth across the line, but in most of its relations the business was local in character and purpose; and State regulations which could hardly have been sustained where transportation was the principal purpose, have been sustained in application to this business. So a herd of cattle, if brought within a State on their way to another State, are within the Federal power; but if they are brought within a State to graze, and if their motion is such only as is incidental to their grazing, the power of the State is not excluded.²

It has been held that making up and sending out a train of empty cars for the purpose of bringing goods into the State is not commerce, but is an operation performed with the intention of engaging in commerce;³ this decision is, however, at variance with the weight of authority.

The purchase, sale and exchange of commodities and the embarkation and disembarkation of passengers, when accompanied by transportation from State to State, is undoubtedly a part of interstate commerce.⁴

¹ *Cotting v. Kansas City Stock Yards*, 79 Fed. Rep. 679, 82 Fed. Rep. 850.

² *Kelley v. Rhoads*, 51 Pac. Rep. 593.

³ *Norfolk & Western R. R. Co. v. Commonwealth*, 93 Va. 749.

⁴ *Walton v. Missouri*, 91 U. S. 280; *Mobile v. Kimball*, 102 U. S. 702; *Head Money Cases*, 112 U. S. 580; *Lin Sing v. Washburn*, 20 Cal. 534; *Sweatt v. Boston, etc. R. Co.*, 3

Cliff. 339.

Telegraphs and Telephones.—The telegraph and telephone have been held to be instruments of commerce, both because they practically engage in transportation, and also because they are so intimately connected with commerce as now conducted that they are essential thereto.¹

Banking and Insurance.—On the other hand, where there has been no transportation, it has been held that “commerce” did not exist.

In *Nathan v. Louisiana*² it was said that a broker dealing in foreign bills of exchange was not engaged in commerce, but, like a ship builder, was engaged in supplying an instrument of commerce.³

So in *Paul v. Virginia*⁴ the court held that issuing a policy of insurance was not a transaction of commerce.⁵ “The policies are simple contracts of indemnity against loss by fire, entered into between the corporation and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of

¹ *Telegraph Co. v. Alabama*, 132 U. S. 472; *Leloup v. Mobile*, 127 U. S. 640; *Telegraph Co. v. Pendleton*, 122 U. S. 347, 356; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1; *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. Rep. 513; *Moore v. City of Eufala*, 97 Ala. 670; *American Union Telegraph Co. v. Western Union Telegraph Co.*, 67 Ala. 26; *City, etc. of San Francisco v. Western Union Telegraph Co.*, 96 Cal. 140; *Central Union Telephone Co. v. State*, 118 Ind. 194; *Chicago, etc. Bridge Co. v. Pacific Telegraph Co.*, 36 Kan. 113; *Union Trust Co. v. Atchison, etc. R. Co.*, 8 N. Mex. 329; *Western Union Telegraph Co. v. Atlantic, etc. Telegraph Co.*, 5

Nev. 102; *In re Pennsylvania Telephone Co.*, 48 N. J. Eq. 91; *Telegraph Co. v. Tyler*, 90 Va. 297; *Telegraph Co. v. Telegraph Co.*, 2 Woods, 643.

² 8 How. 73.

³ See *Ex parte Martin*, 7 Nev. 140; *Tillson v. Gatling*, 60 Ark. 114; *Bamberger v. Schoolfield*, 160 U. S. 149; *State v. Nathan*, 12 Rob. (La.) 332.

⁴ 8 Wall. 163.

⁵ Congress appears, however, to have considered that it was within its power to incorporate associations “having two or more branches in the States or Territories,” for the purpose, among others, of mutual insurance. Act of June 29, 1886, 24 Stat. L. 86; Supp. Rev. Stat., ch. 567, p. 493.

the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale." . . . "The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."¹ A similar opinion was expressed by the House of Lords in the case of the *Citizens' Insurance Co. v. Parsons*.² The question in this case concerned the validity of a regulation of insurance business by the Province of Quebec, which, by the provisions of the British North America Act, is without jurisdiction over inter-provincial regulation of trade and commerce. The court says that the business of insurance, "when carried on for the sake of profit, may, no doubt in some sense of the word, be called a trade, but contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be 'traders' under the English bankruptcy laws."

That the business of insurance is not included within the meaning of the word "commerce" is perhaps clearer than that the regulation of foreign and interstate bills of exchange is not so included. Mr. Hamilton, in his argument on the National Bank,³ enumerates among those subjects over

¹ Conf. *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, where transportation was contemplated by the contract; *Allgeyer v. Louisiana*, 165 U. S. 578, reversing 48 La. Ann. 104; *Hooper v. California*, 155 U. S. 648; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110; *People v. Insurance Co.*, 27 Hun, 188. See also *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566; *People v. Thurber*, 13 Ill. 554; *Farmers'*, etc.

Insurance Co. v. Harrah, 47 Ind. 236; *State v. Phipps*, 50 Kan. 609; *List v. Pennsylvania*, 118 Pa. St. 322; *Insurance Co. v. Commonwealth*, 87 Pa. St. 173; *Bank of Augusta v. Earl*, 18 Pet. 519; *Memphis v. Carrington*, 91 Tenn. 511.

² 7 L. R. App. Cas. 111; *Parsons v. Queen Insurance Co.*, 4 Up. Can. App. 103; 4 Can. S. C. 215.

³ *Hamilton's Works*, edited by Lodge, vol. III, pp. 179, 208.

which it admits of but little, if any, doubt that the national power extends, the regulation of policies of insurance,—referring probably to marine insurance,—of bills of exchange drawn by a merchant of one State upon a merchant of another, and, of course, the regulation of foreign bills of exchange.

It seems, in view of the remarkable development of the banking system within the past fifty years, and its importance in relation to commerce, that the regulation of interstate and foreign bills of exchange might in time fall within the Federal commercial power. Where such bills represent payment for articles brought from other States, they may perhaps be considered to bear the same relation to the purchase, sale and exchange of commodities that freights and fares bear to their transportation.

From another standpoint, bills of exchange may be said, in their relation to transportation of money, to bear some analogy to the relation which a system of free interchange of cars would bear to railroad traffic conducted in the absence of such a system. It is true, both of bills of exchange and of such a system of interchange of cars, that their relation to interstate transportation is in that they make such transportation to some extent unnecessary; and yet a State may not forbid this free interchange of cars, because to do so would place a new burden upon commerce among the States.

To say that an interstate bill of exchange is merely evidence of the transfer of title to personal property located in another State is not only to ignore the fact that money, as the circulating medium, is essential to all commerce, but when sustained the argument seems to prove too much. If the bill of exchange be merely evidence of indebtedness in another State, it may be taxed at the discretion of the State within which it is drawn;¹ and it might, therefore, be prohibited by the State; for "questions of power do not depend on the degree to which it may be exercised."² If this could

¹ Kirtland v. Hotchkiss, 100 U. S. 491.

² Brown v. Maryland, 12 Wheat. 439.

be done, the statement that no burden could be placed upon interstate commerce by a State would be subject to substantial modification.

It seems possible that the rule which would be applied in such a case would be that stated in *Erie Railway Co. v. State*,¹ where it was held that "whenever the taxation of a commodity would amount to a regulation of commerce, within the prohibition of the Constitution, so will the taxation of an inseparable incident or necessary concomitant of such commerce."

In *People v. Raymond*,² an act providing for the raising of revenue from a tax upon foreign and inland bills, and passengers, was held not to be in the nature of a police regulation, but an attempt at the regulation of commerce, and therefore void. On the other hand, in *Ex parte Martin*,³ a statute requiring the fixing of revenue stamps to foreign bills of exchange was held to be a legitimate exercise by the State of its power of taxation.

The Authority to Define Articles of Commerce.—The question, what articles are legitimate subjects of trade and commercial intercourse, is determined by the general commercial usage of the world, and does not depend upon the declaration of any State.⁴

The necessity of this rule is apparent. If Congress could regulate only those subjects which the States decided were proper subjects of Federal regulation, the power of the States would be paramount to the power of Congress.

Prevention of Fraud—Oleomargarine Cases.—In *Plumley v. Massachusetts*,⁵ the court modified this rule considerably. In that case a State law prohibiting the sale of

¹ 81 N. J. L. 581.

² 84 Cal. 492.

³ 7 Nev. 140.

⁴ *Bowman v. Railway Co.*, 125 U. S. 465-501; *Sawrie v. Tennessee*, 83

Fed. Rep. 615; *Vandercook Co. v. Vance*, 80 Fed. Rep. 786; *In re Gooch*, 44 Fed. Rep. 276; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

⁵ 155 U. S. 461. For cases concern-

oleomargarine, colored to resemble butter, was sustained as applied to an article imported from another State, on the ground that the resemblance, artificially created, was in the nature of a fraud.

It is not clear that the statute was entirely free from discrimination. Oleomargarine is produced in comparatively few places, while butter is produced in every farming community. The willingness of States to discriminate against the importation of dressed meat is shown in many recent cases in which State laws have been held unconstitutional on this ground. Legislation against oleomargarine might not improbably trace its origin to the same source.

In the case referred to it was conceded that the article sold was "wholesome, palatable and nutritious." It was, however, colored to resemble butter, and this, it was held, the State might prohibit, so long as the importation and sale of uncolored oleomargarine was not burdened. *Leisy v. Hardin* was distinguished on the ground that in that case no fraud was practiced. The beer which was the subject of sale was what it appeared to be, and not a liquid artificially colored to resemble beer.

From this opinion Mr. Chief Justice Fuller, Mr. Justice Field and Mr. Justice Brewer dissented. "It cannot be denied," said Mr. Chief Justice Fuller, in delivering the dissenting opinion, "that oleomargarine is a recognized article of commerce." . . . "The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see. . . . In the language of Knowlton, J., in the dissenting opinion below, I am not 'prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the

ing State power over oleomargarine S. 678; *State v. Marshall*, 64 N. H. in domestic commerce, see Schol- 549; *People v. Arensburg*, 105 N. Y. lenberger v. Pennsylvania, 171 U. 123. S. 1; *Powell v. Pennsylvania*, 127 U.

appearance of being wholly wool, when in fact it is part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations.'"

It is probable that the opinion of the majority in this case is, as the Chief Justice said, inconsistent with settled principles. The distinction which it is attempted to make between the Plumley case and *Leisy v. Hardin* is not convincing. The beer which was the subject of sale in *Leisy v. Hardin* was not colored, it is true; but prevention of fraud is not the only purpose of State police laws. The consequences of buying, even through error, a "wholesome, palatable and nutritious" substitute for butter, instead of the genuine article, are not worse than the consequences of disease and crime which result from the general use of intoxicating liquors.

Upon principle, the two cases of *Leisy v. Hardin* and *Plumley v. Massachusetts* are not distinguishable; and as concerns the question of the authority which shall determine what are subjects of commerce, the rule announced in *Bowman v. Railway Co.*, in *Leisy v. Hardin*, and repeated in the dissenting opinion of the Chief Justice in *Plumley v. Massachusetts*, is the rule which is supported by a long line of decisions of the Supreme Court and by the necessities of the case.

In *Armour Packing Company v. Snyder*¹ the argument of the Plumley case was carried beyond the point sanctioned by the Supreme Court, and the conclusions reached strikingly illustrate the inherent difficulties of the rule. In this case a State law forbidding the sale of oleomargarine, unless colored bright pink, was applied to goods which had been shipped into Minnesota from Kansas, which were marked and stamped as required by the United States laws, and sold only in original packages. The Federal law, it was said,

¹84 Fed. Rep. 186.

prevented deception in the sale of the imported package. The State law prevented deception in the retail sale of any quantity. For this purpose the requirement as to color was held to be valid. "It is true," the court said, "that plaintiff's witnesses testify with great positiveness that, while oleomargarine is largely sought and purchased as an article of commerce, yet, if it were colored bright pink, no sale of it could be made as an article of food. And this opinion is doubtless true. But there is nothing in bright pink, as a color, calculated to excite repugnance or loathing. Shades of color akin to it are sometimes given to jellies, ices, and other articles of food, to make them more attractive, and are natural to some preparations of fruit. And it does not appear that oleomargarine would not be equally unsalable if put on the market without coloring, or with any color not a close imitation of the color of dairy butter. The inference is that its marketable value mainly consists in the facility with which those who buy it cheaper than dairy butter can impose it as that article upon those who eat it in the belief that it is butter, and would refuse it if informed what it is in fact."

In *Collins v. New Hampshire*¹ this reasoning was disapproved, and it was held that, as a State cannot prohibit the sale of an article of commerce, it cannot require that the article should be made unsalable.

The question whether, as was said in the Snyder case, the color pink is "calculated to excite repugnance or loathing," is determined not alone by a consideration of the color itself, but also of the article colored. Potatoes colored bright pink throughout, or eggs colored green, would probably be as unmarketable as pink oleomargarine; and the suggestion that there is nothing in either of these colors which excites loathing would not justify a law requiring that they should be so colored.

It is true that oleomargarine might be unsalable if put on the market without coloring, and probably equally true of

¹ 171 U. S. 80.

much of the butter produced in the Northern States during the winter months. This butter is commonly colored so as to present the appearance of grass butter, without which it would probably find no market. It would be possible, therefore, if the legislature applied the same rule to both cases, for a State to require all winter butter to be colored bright pink or blue. Following the same argument, the jellies and ices to which the court referred in the Snyder case, such as are commonly colored in shades of red, might be forbidden unless colored yellow, and the requirement might be justified on the ground that oleomargarine and butter are pleasing when colored yellow, and therefore the jellies should be.¹

As a matter of fact, artificial coloring of food or cloth or any other substance, so as to present the appearance of another article, is not, in itself, fraudulent.² Celluloid is manufactured in such forms that it is capable, to a certain extent, of answering as a substitute for articles as dissimilar as ivory on the one hand, and linen on the other, and the fact that it is so made is not considered indicative of fraud.

There is a large class of articles of commerce in which appearance is as important as any other quality, and here the question of color is one upon which public taste is generally exacting. It is particularly true of many articles used for foods, that much of their value is due to their appearance. Many persons who use oleomargarine knowingly, prefer that it should be colored yellow; and there are few who would be willing to eat it if colored strangely. Under such circumstances it does not answer the practical requirements of the situation to say that one color is as beautiful as another, and that all are found in nature. If the State may prescribe the rule which shall be followed in all these cases, and may prohibit the making of any article to resemble another, there is at once opened a wide field of conflicting and discriminating State legislation such as the Constitution intended to prevent.

¹ *Conf. People v. Arensburg*, 105 N. Y. 123; *W. P. Prentice on Police Powers*, p. 101. ² *People v. Pease*, 30 *Chic. Leg. N.* 277.

In other cases in which the police power of the State has been discussed, it is said that it is limited to the right of self-defense, in which it has its origin; and that a State may not by general regulations exclude articles which are actually fit for and belong to commerce.¹ Police regulations which forbid the sale of one article for another, or which require that the character of an article sold should be distinctly stated upon the package, may therefore be sustained.² Statutes which go beyond this, and obstruct the transportation and sale of legitimate articles of commerce, have generally been considered unconstitutional.

Manufacture is Not Commerce.—Neither the production nor the manufacture of commodities, nor their preparation for transportation, are acts of commerce. Manufacture is the fashioning of raw material into a new form. Commerce succeeds manufacture, and begins only when manufacture is complete. That an article is made for export to another State does not of itself make it an article of interstate commerce. There is hardly any large industrial or manufacturing establishment in the country that could be carried on without shipping its product from one State to another; nevertheless, the manufacture is distinct and independent from commerce. Otherwise Congress could regulate not manufactures alone, but every branch of human industry. “For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multi-form, and vital interests—interests which in their nature are and must be, local in all the details of their successful

¹ *Brimmer v. Rebman*, 138 U. S. 78.

² *Conf. Brechbill v. Randall*, 102 Ind. 523.

management.”¹ It is therefore held that the fact that commodities when manufactured are intended for transportation to other States or countries does not bring their manufacture within Federal control. State laws forbidding the manufacture² or keeping³ of intoxicating liquors, except for certain purposes, have been sustained, as applied to manufacture or keeping of liquor for shipment without the State.

Illustrations of Business Not Within Federal Control.—The business of a commercial agency in procuring and furnishing information of the standing of merchants is not commerce, and a tax thereon is not in conflict with the commerce clause.⁴ Nor is the business of a building and loan association;⁵ nor of loaning money;⁶ nor of dealing in foreign lands;⁷ or of conducting a manufacturing establishment in another State;⁸ or of mining;⁹ or of practicing medicine in connection with the sale of imported drugs;¹⁰ and the taxation of legacies payable to aliens has no relation with commerce.¹¹ In the case of a peddler selling lightning rods brought from another State, the business of erecting the rods is not commerce, and is subject to State regulation.¹²

Gambling.—The protection of the Constitution does not extend to lotteries, games of chance or speculation. These may be interstate gambling, but are not commerce. A State

¹ Kidd v. Pearson, 128 U. S. 1-21. Co., 92 Ala. 157; Huffman v. Western Mortgage & Investment Co., 13 Tex. Civ. App. 169.

² Kidd v. Pearson, 128 U. S. 1; United States v. E. C. Knight Co., 156 U. S. 1, 60 Fed. Rep. 984; Mugler v. Kansas, 123 U. S. 628; United States v. Boyer, 85 Fed. Rep. 425; Pearson v. Distillery, 72 Iowa, 348; Treadway v. Riley, 32 Neb. 495; State v. Lovell, 47 Vt. 493.

³ State v. Fitzpatrick, 16 R. I. 54.

⁴ State v. Morgan, 2 S. D. 82.

⁵ Southern Building & Loan Association v. Norman, 98 Ky. 294.

⁶ Nelms v. Edinburg Mortgage

⁷ Honduras Commercial Co. v. State Board, 54 N. J. L. 278.

⁸ Standard Cable Co. v. Attorney-General, 46 N. J. Eq. 270; State v. Cable Co., 18 Atl. Rep. 581.

⁹ Utley v. Gardner Lode Mining Co., 4 Colo. 389.

¹⁰ State v. Wheelock, 95 Iowa, 577.

¹¹ Mager v. Grima, 8 How. 490.

¹² State v. Gorham, 115 N. C. 721.

may regulate or prohibit buying and selling what are commonly known as "futures;"¹ may prohibit the sale of lottery tickets or of bonds containing conditions which make their value dependent upon chance;² it may forbid the sale of pools on horse-races conducted without the State, although not forbidden as to races conducted within the State;³ and may forbid the sending of money without the State for gambling purposes.⁴

By the act of September 19, 1890,⁵ it is provided that letters and circulars concerning lotteries or other similar enterprises whose profits depend upon chance, or concerning schemes devised to obtain money under false pretenses, newspapers containing advertisements of such enterprises, and money for the purchase of lottery tickets, etc., are all excluded from the United States mails.

Infected Goods, Criminals, etc.—Articles which from their nature do not belong to commerce are, for that reason, subject to the police power of the State. Disease and pestilence, crime and pauperism, are not legitimate subjects of commerce,⁶ and passengers, goods or animals infected with disease, or passengers who are convicted criminals or paupers, idiots, lunatics, or persons likely to become a public charge, may, it seems, be excluded by the States,⁷ or, when they are admitted, their transportation within the State may be regulated. Thus, it is held that a State may forbid

¹ Fortenbury v. State, 47 Ark. 188; Co. v. Husen, 95 U. S. 465, 471; Alexander v. State, 86 Ga. 246. Commissioners of Immigration v. Brandt, 26 La. Ann. 29.

² Ballock v. State of Maryland, 78 Md. 1; Roselle v. McAuliffe, 39 S. W. Rep. 274. ⁷ Bowman v. Railway Co., 125 U. S. 465, 492; Missouri, etc. R. Co. v. Haber, 169 U. S. 613; Kimmish v. Ball, 129 U. S. 217; Steamship Co. v. Louisiana, 118 U. S. 455; Guy v. Baltimore, 100 U. S. 443; Railroad Co. v. Husen, 95 U. S. 465; In re Ware, 53 Fed. Rep. 733; In re Barber, 39 Fed. Rep. 641; Swift v. Sutphin, 39 Fed. Rep. 630; Missouri, etc. R. R. Co. v. Finley, 38 Kan. 550.

³ State v. Stripling, 113 Ala. 120.

⁴ Lacey v. Palmer, Sheriff, 93 Va. 159; State v. Harbourn (Conn.), 40 Atl. Rep. 179.

⁵ Supp. U. S. Rev. Stat., ch. 908, p. 803; In re Rapier, 143 U. S. 110.

⁶ License Cases, Opinion of Chief Justice, 5 How. 504, 576; Leisy v. Hardin, 135 U. S. 100, 113; Railroad

the entrance of Southern cattle liable to communicate Texas fever unless carried in cars under certain precautions.¹

The Federal government has expressly recognized the right of the States to regulate the introduction and transportation of nitro-glycerine and other high explosives within their limits,² although in the absence of such a provision it would doubtless be within the power of a State to act upon the subject so far as necessary to protect persons and property.³ The States may also take necessary steps for protection against physical and moral pestilence; and, while acting in good faith to this end, may decide upon the fact whether the goods or passengers are thus infected.⁴

So a State may impose a license tax for the purpose of excluding an obscene paper.⁵ Indecent publications and articles are excluded from the mails;⁶ their transportation from State to State,⁷ and importation from foreign countries,⁸ is forbidden by Federal statute, and they are generally prohibited by State laws. So a corpse is not property nor a legitimate subject of commerce.⁹ The transportation or exportation of cattle, sheep and other ruminants and their meat, diseased, or which have been exposed to infection, is forbidden by the Federal statutes;¹⁰ but in the absence of such a statute, or upon subjects not covered by its provision, the States may take such measures as are necessary for their protection.

¹ *Grimes v. Eddy*, 126 Mo. 168. See *post*, pp. 170-174.

² U. S. Rev. Stats., sec. 4280.

³ See *Patterson v. Kentucky*, 97 U. S. 501.

⁴ See cases cited in note 7, p. 56. Opinion of Mr. Justice Catron in *License Cases*, quoted in *In re Rahrer*, 140 U. S. 545, 557; *Preston v. Finley*, 72 Fed. Rep. 850.

⁵ *Preston v. Finley*, 72 Fed. Rep. 850.

⁶ Act of Sept. 28, 1898, Supp. U. S. Rev. Stat., p. 631.

⁷ Act of Feb. 8, 1897, 29 Stat. L., p. 512.

⁸ Act of Aug. 27, 1894, 28 Stat. L. 549; Act of July 24, 1897, First Session 55th Cong., p. 208.

⁹ *In re Wong Yung Quy*, 6 Sawy. 442. See *Mayor of New York v. Ferguson*, 28 Hun, 594.

¹⁰ Act of May 20, 1884, 28 Stat. L. 81; Supp. Rev. Stat. 485; Act of March 3, 1891, 26 Stat. L. 1089; Supp. Rev. Stat. 937. See Act of Aug. 30, 1890, 26 Stat. L. 414; Supp. Rev. Stat. 794.

It is common also to prohibit the sale of milk below a certain standard of quality, of adulterated articles, and of jewelry by peddlers; and these statutes have been sustained as police regulations for prevention of fraud.¹

Limitation upon State Jurisdiction.—It is to be remembered, however, as was said in the Bowman case, that “all these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others.”² The power of the State over such matters is limited by the right of self-defense, in which it has its origin.³ It “can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.”⁴ Nor under a general classification may a State exclude articles that are actually fit for and belong to commerce.⁵ For this reason it was undecided in *Henderson v. The Mayor, etc.*,⁶ whether a State, in the exercise of its police power, could go so far as to exclude paupers and criminals. Where the evil apprehended by the State from the ingress of foreigners is that they will disregard the laws of the State, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties. If persons not convicts could be forbidden to land and to reside in the State, or to pass through into other and interior States, a door would be opened to all sorts of oppression. A statute which obstructs the entrance into the State of persons who are neither pau-

¹ *Commonwealth v. Waite*, 11 Allen, 264; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Evans*, 132 Mass. 11; *Commonwealth v. Holt*, 146 Mass. 512; *Commonwealth v. Wetherbee*, 153 Mass. 159; *State v. Campbell*, 64 N. H. 402; *State v. Smythe*, 14 R. I. 100; *People v. West*, 106 N. Y. 298; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

² 125 U. S. 492.

³ *In re Ah Fong*, 3 Sawy. 145.

⁴ *Chy Lung v. Freeman*, 92 U. S. 275, 280; *Salzenstein v. Mavis*, 91 Ill. 391.

⁵ *Brimmer v. Rebman*, 138 U. S. 78; *State v. Barber*, 136 U. S. 818; *In re Ware*, 53 Fed. Rep. 783; *State v. Duckworth (Idaho)*, 51 Pac. Rep. 456; *Health Dept. v. Purdon*, 99 N. Y. 237.

⁶ 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *In re Ah Fong*, 3 Sawy. 145.

pers, vagabonds or criminals, or in anywise unsound in body or mind, is not an exercise of the police power in any just sense of that term.¹

Articles in such condition that they tend to spread disease are not legitimate subjects of trade and commerce;² and the laws which require precautions necessary to protect the health of the public are no more regulations of commerce than statutes which permit their importation are quarantine laws.³ Any means employed by a State in good faith, appropriate to the protection of its people, and not in violation of any Federal law or treaty, is therefore within State authority. Further limitations than these, being largely based upon political considerations, should arise from the action of Congress rather than from the decisions of the courts.

Police Power of Congress.—The power of commercial regulation which is given to Congress casts upon that body the duty of police regulation of such commerce. The fact that the States are in large measure deprived of powers to exclude from their territory persons and property which they consider hostile to their interests, requires that the Federal government should be prompt in its effort to give full measure of protection.

This jurisdiction has been exercised by laws prohibiting transportation from State to State of articles intended for indecent purposes, by regulation of transportation of explosives, of live-stock, and in many other ways.

The limitations upon the powers of the State to enact police laws find a parallel also in the limitations upon the power of Congress in this respect. Neither a State nor the United States can, under the police power, deprive a citizen of the right to transport a proper article of commerce from one State to another, nor impose conditions upon the exercise of that right except as may be necessary to secure the freedom or proper conduct of commerce.

¹ State v. Constitution, 42 Cal. 570.

² Gibbons v. Ogden, 9 Wheat. 235.

³ Leisy v. Hardin, 135 U. S. 100.

CHAPTER III.

DISTINCTION BETWEEN DOMESTIC AND INTERSTATE COMMERCE.

The business of transportation and the instrumentalities connected therewith come within the control of Congress, when the traffic is "among the several States," and this phrase includes Territories also.¹ "'Among' means 'intermingled with.' . . . Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior."² Of course, all commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States, is, with the single exception of trade with the Indian tribes,³ outside of Federal control.⁴

The subject of interstate commerce may conveniently be considered, in the first place, in connection with the goods carried; in the second place, in connection with the carrier; and in the third place, with regard to Federal jurisdiction over the public navigable waters of the United States.

RELATION OF COMMERCE TO THE GOODS CARRIED.

Whenever an article of commerce has begun to move from one State to another, commerce in that commodity

¹ *Stoutenburgh v. Hennick*, 139 U. S. 141; *Ex parte Hanson*, 28 Fed. Rep. 127; *The Louisa Simpson*, 2 Sawy. 57.

² *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 448, 447; *Endleman v. United States*, 86 Fed. Rep. 456.

³ *United States v. Holliday*, 8 Wall. 407; *United States v. Forty-three Gallons of Whiskey*, 98 U. S. 188.

⁴ *Gibbons v. Ogden*, 9 Wheat. 1; *Sands v. Improvement Co.*, 128 U. S. 288; *Louisville, etc. Ry. Co. v. Mississippi*, 138 U. S. 587; *Trade-mark Cases*, 100 U. S. 82, 96; *License Tax Cases*, 5 Wall. 462, 470; *Dugan v. State*, 125 Ind. 180; *Heiserman v. Railroad Co.*, 68 Iowa, 732. *Conf. Scammon v. Kansas City, etc. R. Co.*, 41 Mo. App. 194.

among the States has commenced.¹ If such transportation actually be carried on, the motive with which it is done is immaterial, even though it be to escape from the operation of State laws.²

When Federal Control of Commerce Begins.—In general terms it may be said that Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome, conflicting or discriminating State legislation. In the absence of such considerations, interstate commerce commonly begins with negotiations and contracts looking to transportation among the States.³

It has been suggested that, if goods are intended for transportation to a foreign country, they come within the Federal jurisdiction so far as to be subject to Federal regulation of trade-marks;⁴ but, with this possible exception, it is held that an intention to ship certain goods does not, of itself, make those goods the subject of interstate or foreign commerce.⁵ What will constitute such a positive act on the part of the shipper as to segregate the property to be transported from the general mass of property in the State, the decisions are not in entire accord.

When Interstate Transportation Begins.—In a number of cases it has been held that, when specific goods have by some definite act been set apart for shipment, they must be regarded as in transit, if shipment was actually made within

¹ *The Daniel Ball*, 10 Wall. 557; *Bennett v. American Express Co.*, 83 Me. 286.

² *North River Steamboat Co. v. Livingston*, 8 Cow. 713.

³ *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Taxing District*, 120 U. S. 489; *Asher v. Texas*, 128 U. S. 199; *McCall v. California*, 136 U. S. 104; *Brennan v. City of Titusville*, 153 U. S. 289; *MacNaughton v. McGil*, 49 Pac. Rep. 651. (Mont.)

⁴ *Ryder v. Holt*, 128 U. S. 525.

⁵ *Coe v. Errol*, 116 U. S. 517; *L. & N. R. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 702; *Carrier v. Gordon*, 21 Ohio St. 605; *McConn v. Roberts*, 25 Iowa, 152; *Rothermel v. Myerle*, 136 Pa. St. 250; *In re Greene*, 52 Fed. Rep. 104; *Treadway v. Riley*, 32 Neb. 495; *Norfolk & Western Ry. Co. v. Commonwealth*, 93 Va. 749. See *White v. Michigan Central Ry. Co.*, 2 Int. Com. Rep. 641.

a reasonable time thereafter.¹ The rule has, however, been settled otherwise. The question whether an article is or is not the subject of transportation must be determined by the fact whether it has actually been put in motion or committed to the carrier for that purpose. Until this is done the article, though intended for exportation, may never be exported.²

In *Coe v. Errol*³ it was held that logs cut in New Hampshire and hauled to the town of Errol upon the Androscoggin river in that State, and which waited there until they could be floated upon the river to Lewiston in Maine, were not subjects of interstate commerce. Mr. Justice Bradley, in delivering the opinion of the court, said: "There must be a point of time when goods cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State."⁴

Interruption of Transportation.—A temporary stoppage of goods which have once commenced to move from State

¹ *Ogilvie v. Crawford County*, 7 Fed. Rep. 745; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286; *Standard Oil Co. v. Bachelor*, 89 Ind. 1.

² *Norfolk & Western Ry. Co. v. Commonwealth*, 93 Va. 749; *Turpin v. Burgess*, 117 U. S. 504; *Carrier v. Gordon*, 21 Ohio St. 603.

³ 116 U. S. 517.

⁴ *In re Greene*, 52 Fed. Rep. 104; *Bennett v. American Express Co.*, 88 Me. 287; *C. N. Nelson Lumber Co. v. Town of Lorraine*, 22 Fed. Rep. 54; *McConn v. Roberts*, 25 Iowa, 152; *Turner v. Maryland*, 167 U. S. 88.

to State, not being an abandonment of the original movement, does not terminate the transit.¹ So a transshipment of freight which has once started upon its passage to another State does not break up the carriage so as to bring it within the control of a single State;² but where property is held for any other purpose than that of continuing the shipment within a reasonable time, it cannot be considered as in transit.³ For this reason property temporarily stopped just before arrival at destination and there held for sale is not in transit, but is stock in trade and subject to State taxation.⁴

In *State v. Corrigan*⁵ it was held that "a foreign corporation whose business is the mining of coal which is sent by railroad across this state to tide water, for shipment to customers in other states, and whose office for receiving orders for coal and transacting its business is in New York City," . . . "is not taxable on coal lying on its dock, which is delayed within this state awaiting shipment to other states." In *State v. Engle*⁶ a broader rule was stated. In that case a foreign corporation engaged in mining coal in Pennsylvania was accustomed to ship to its agents in New Jersey, where the coal was assorted and further shipment made in accordance with advices of sales in New York. The court held that while the coal was delayed in New Jersey temporarily on docks awaiting shipment, the transit had not terminated, and it was not subject to taxation by the State of New Jersey.

It can be seen that cases where property is temporarily maintained in a State for other purposes than transportation, but where the movement is continued, would present

¹ *Commonwealth v. Del. & H. Co.*, 598; *Chicago, R. I. & P. Ry. v. Chicago & Alton Ry. Co.*, 2 Int. Com. 21 W. N. C. 525.

² *The Daniel Ball*, 10 Wall. 557; Rep. 721; *In re Unlawful Rates*, 7 Ex parte Koehler, 80 Fed. Rep. 867. Int. Com. Rep. 240.

³ *Standard Oil Co. v. Combs*, 96 Ind. 179; *Walton v. Westwood*, 73 Ill. 125; *Myers v. Commissioners of Baltimore County*, 83 Md. 885; *Kelley v. Rhoads* (Wyo.), 51 Pac. Rep. 156 U. S. 577.

⁵ 39 N. J. L. 85.

⁶ 34 N. J. L. 425.

difficult questions, and this situation has actually arisen under the Migratory Stock laws of Western States. It is natural that grazing cattle should wander from place to place, and not infrequently advantage is taken of this fact, while fattening the stock, to drive them slowly toward the market for which they are preparing. *Kelley v. Rhoads*¹ involved the validity of State taxation upon a herd of sheep which were being driven through Wyoming from Utah to Nebraska. No tax, the court said, could be laid upon property in transit from one State to another, but, if the sheep were brought into the State to find grazing grounds, interstate transportation ceased when the grazing grounds were found. The question upon which the validity of the tax depended was, therefore, a question of purpose,—whether the grazing was incidental to transportation, or whether the transportation was incidental to the grazing. It is not true that every time a person drives his herds into a State, intending at some future period to pass from it into another State, his cattle are wholly beyond State jurisdiction. It would be possible, under such a rule, by selecting a circuitous route, to avoid taxation upon grazing animals.

In considering the question of *situs* in such cases, it is necessary to look to the course and method of travel, the character of the live-stock and of the territory grazed upon, the time employed, possibly the time of year, and all other considerations which would throw light upon the purpose of the owner; and where, upon such examination, it is found that property is kept within the State for some other purpose than that of transportation, the original movement must be considered as abandoned.

When Transit Ends.—Being once started upon the passage from one State to another, passengers and merchandise are subject to exclusive regulation by Congress until lost in the general mass of people or property of the State to which they travel.²

¹ 51 Pac. Rep. 598 (Wyo.) Conf. *Farris v. Henderson*, 1 Okl. 384.

² *Passenger Cases*, 7 How. 405, 423; *Head Money Cases*, 112 U. S. 590;

But when does this commingling take place? "There is a difficulty, it is true, in all cases of this character," said Mr. Justice Field, delivering the opinion of the court in *Welton v. Missouri*,¹ "in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in *Brown v. Maryland*, in drawing the line of distinction between the restriction upon the power of the States to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held, that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.

"Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the com-

New York v. Compagnie, etc., 107 U. S. 59; Carson River Lumber Co. v. Patterson, 83 Cal. 334; State v. Kennedy, 19 La. Ann. 397; Hard-
ware Co. v. McGuire, 39 La. Ann. 848.
¹ 91 U. S. 275.

modity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."¹

In the absence of such considerations it has been held that, for some purposes, goods pass from Federal to State control at the moment when they are delivered by the carrier to the consignee. Thus, in *Fuqua v. Pabst Brewing Company*² it was held that contracts relating to the retail sale of goods after delivery by the carrier are subject to State laws against monopolies, and are no longer within the Federal jurisdiction. The commerce clause does not give to the Federal government power to regulate production, distribution or use of property within the States.

In most cases, however, the Federal power over commerce cannot cease when the goods have been delivered by the carrier to the consignee. If, as was said by Mr. Justice Johnson, the conflict of commercial regulation by the different States led to the grant of commercial power to Congress, the grant should be as extensive as the mischief, and should extend so far as to protect imported articles, even after actual transportation had ceased, from any discrimination which might be made against them on account of their foreign origin.

There has been, however, great difficulty in the practical application of this rule. It is well established that a State may not prohibit the entrance of any article of commerce, and it is equally well established that it may forbid or regulate within its limits certain kinds of traffic. The question has therefore arisen, how far such prohibitory laws may act upon articles introduced from other States or countries.

The Original Package Rule.—In *Brown v. Maryland*,³ the first case involving this question, decided by Mr. Chief

¹ 91 U. S. 281. See also *Tiernan v. Rinker*, 102 U. S. 123, 127; *Steamship Co. v. Pennsylvania*, 122 U. S. 341; *Brown v. Houston*, 114 U. S. 622.

² 90 Tex. 298.

³ 12 Wheat. 419. See comment of Taney, C. J., on this case in *License Cases*, 5 How. 575.

Justice Marshall in 1827, it was said that as sale is the object of importation, and an essential ingredient of that intercourse of which transportation constitutes a part, therefore importation of goods for sale was not complete until the goods had been sold, and an article could not be considered as incorporated with the general mass of property of the State while still remaining in first hands and in the original package.¹

The rule thus made has met with criticism. As was said by Mr. Justice Bradley in *Brown v. Houston* in 1884, an article might remain in this condition for years, awaiting a favorable market. That goods remain in the "original package" may, as Mr. Justice Daniels said in the *License Cases* in 1854, be entirely without significance. An article bought in one State and taken to another might, if satisfactory to the purchaser, remain many years "in first hands and in original package," yet it could hardly be exempt from taxation.

In 1868, in *Woodruff v. Parham*,² the Supreme Court distinctly denied that the rule of *Brown v. Maryland* applied to articles shipped from one State to another, and limited its application to articles imported from foreign countries. In that case a law of Alabama, imposing a tax upon sales of articles brought from other States and sold in original packages, was sustained. In deciding the case Mr. Justice Miller said: "It is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible." . . . "The merchant of Chicago who buys his goods in New York

¹ *Commonwealth v. Holbrook*, 10 State v. Pratt, 59 Vt. 590; State v. Allen, 200; *Richards v. Woodward*, Intoxicating Liquors, 88 Me. 158; 118 Mass. 285; State v. Shapleigh, Bode v. State, 7 Gill (Md.), 326; State v. Robinson, 49 Me. 285; State v.

² 8 Wall. 123; S. C., 41 Ala. 334. Board of Assessors, 46 La. Ann. 145; See also *Hinson v. Lott*, 8 Wall. State v. Amery, 12 R. I. 64; State 148; *Low v. Austin*, 18 Wall. 29; v. Shapleigh, 27 Mo. 344.

and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children."

It seems, therefore, that in 1868 the doctrine known as the Original Package rule was distinctly presented to the Supreme Court, and that its application was limited to foreign commerce; and it seems that it was understood as recently as the cases of *Brown v. Houston*¹ in 1885, and *Robbins v. Tasing District*² in 1886, that this rule did not restrict the powers of the States over goods brought from other States. This was certainly the understanding of the State courts.³ In the Robbins case it was said that "when goods are sent from one state to another for sale, or, in consequence of a sale, they became part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are."

The rule as thus announced has the advantage of being co-extensive with the mischief it is sought to remedy.

But in the case of *Bowman v. The Northwestern Railroad*, in 1887,⁴ the court by a divided vote, Mr. Chief Justice Waite and Justices Harlan and Gray dissenting, returned to the statement of the rule announced by Mr. Chief Justice Marshall in *Brown v. Maryland*, and although in this case "the determination of whether the right of transportation of an arti-

¹ 114 U. S. 622.

² 120 U. S. 489.

³ *State v. Fulker*, 48 Kan. 287; *Conf. O'Neil v. Vermont*, 144 U. S. 823; *State v. Four Jugs*, 58 Vt. 140; *State v. Bowman*, 78 Iowa, 519; *State v. Zimmerman*, 78 Iowa, 614; *State v. Gurney*, 37 Me. 149. *State v. Creedon*, 78 Iowa, 556; *Lincoln v. Smith*, 27 Vt. 323; *People v.*

Huntington, 4 N. Y. L. Obs. 187;

State v. Fitzpatrick, 16 R. I. 54.

⁴ 125 U. S. 465.

cle of commerce from one State to another includes by necessary implication the right of the consignee to sell in unbroken packages at the place where the transportation terminates," was in express terms reserved, yet the argument of the majority conducted "irresistibly to that conclusion,"—a conclusion which was affirmed by a divided vote in *Leisy v. Hardin*,¹ and followed in many cases.²

The question in the last-named case involved the validity of a statute of Iowa which forbade the sale of intoxicating liquors, except for certain purposes, and under a license which could be granted only to a citizen of Iowa, resident in the county in which the liquor was to be sold. Such a law seems invalid as discriminating against citizens of other States, and the decision might have been placed upon this ground. In *Speer v. Commonwealth*³ the Supreme Court of Virginia considered the question whether a State law restricting to residents the right to obtain a license was illegal as discriminating against citizens of other States. The case arose upon a law prohibiting any person not a resident merchant, mechanic or manufacturer to sell goods by sample. It was held that this did not import a personal residence, but referred to the place of business; that any person, though a citizen of and living in another State, might take out a license to transact business as a merchant of Virginia, and that for this reason

¹ 185 U. S. 100, reversing S. C., 78 Iowa, 286.

² *Lyng v. Michigan*, 185 U. S. 161. See *In re McAllister*, 51 Fed. Rep. 282; *In re Sanders*, 52 Fed. Rep. 802; *In re Ware*, 53 Fed. Rep. 788; *In re Minor*, 69 Fed. Rep. 233; *State v. McGregor*, 76 Fed. Rep. 956; *State of Louisiana v. Kennedy*, 19 La. Ann. 397; *Yerteau v. Bacon's Estate*, 65 Vt. 516; *State v. Corrick*, 83 Iowa, 451; *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *Tuchman v. Welch*, *Yount v. Welch*, 42 Fed. Rep. 548; *State v.*

Cardwell, 81 Iowa, 759; *State v. Pleajor*, 81 Iowa, 759; *State v. Winters*, 44 Kan. 723; *Wind v. Iler*, 93 Iowa, 316; *State v. Joyner*, 81 N. C. 534; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *In re Lebolt*, 77 Fed. Rep. 587; *State v. Kibling*, 63 Vt. 636; *State v. Intoxicating Liquors*, 82 Me. 558; *State v. Intoxicating Liquors*, 88 Me. 158.

³ 23 Gratt. (Va.) 935; *Pacific Junction v. Dwyer*, 64 Iowa, 38. Conf., however, *Kohn v. Melcher*, 29 Fed. Rep. 433; *Sinclair v. State*, 69 N. C. 47.

the statute was not unconstitutional. The suggestion is therefore made, that the court would have regarded a law which refused licenses to citizens of other States as invalid by reason of this discrimination. It seems now that had the court taken this view of the statute involved in *Leisy v. Hardin*, the doctrine of that case might not since have received the support of the court, for the decisions which immediately followed that case largely modified the absolute rule then prevailing.

The Rule is Not of Logic but of Convenience.—It is clear that some time must be fixed when goods pass from Federal control to the jurisdiction of the State into which they are imported, and it is very likely that the original-package rule most effectively answers the practical requirements of the situation.¹

At the same time, viewed from the standpoint of principle, the rule is inconsistent with recognized doctrine, both because it limits the powers of the States more than is consistent with the purposes of the Constitution, and because it fails to give interstate commerce the full protection that is required.

The rule permits State restrictions upon the retail sale of articles purchased at wholesale,—a necessary and important operation of commerce. This has been the subject of comment in several cases. "I can perceive no rational distinction," said Mr. Justice Daniels in the *License Cases*,² "which can be taken upon the circumstance of mere quantity, shape, or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter." Moreover, as was said in the *Trade-mark Cases*,³ "every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels

¹ See opinion of Taney, C. J., in *License Cases*, 5 How. 504, 575.

² 5 How. 504, 614.

³ 100 U. S. 82-95.

and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property." If the right of the consignee to sell be maintained on the ground that sale is an essential ingredient of that intercourse of which transportation constitutes a part, then the consignee should, if the argument be sustained, be allowed to sell in any quantity as well as for any price he chose. "The fact that as a matter of convenience in handling, during the transportation of the property, the bottles were packed in boxes and barrels can make no difference as to the character in law of the transaction. If he had the right to bring liquor within the state, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest, for, as far as we are advised, there is no regulation upon the subject, of either state or national enactment. The right to buy and sell in such quantities as he chose is necessarily included in the right to buy and sell in any quantity." . . . "Any other holding it seems to us would lead to results and conclusions which, owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind."¹

Viewed in the second place, from the standpoint of the States, the operation of the rule is unfortunate in that it deprives the States of authority essential for effective enforcement of necessary police regulations. It is not claimed that they may prohibit the introduction of proper articles of commerce. Grain, dry-goods, hardware and other merchandise of such character may be introduced within a State with or without its permission, and when so introduced can be sold at wholesale or at retail, as the importer may elect; but there are articles of commerce which occupy a different re-

¹ *Collins v. Hill*, 77 Iowa, 181; *State*, 11 Md. 525; *Connolly v. Scarr*, *Grusendorf v. Howat*, id. 187; *Leisy* 72 Iowa, 223.
v. Hardin, 78 Iowa, 286; *Keller v.*

lation to the health and morals of the community. Nitroglycerine and arsenic are property, and subjects of commerce; but all agree that a reasonable regulation of their introduction, use and sale is a proper exercise of the police power of a State, whether in original packages or not; and this rule has been applied to other articles beside explosives and poisons.¹

This proposition was recognized for many years in the laws by which free States excluded slave property,² and was approved in the case of *Leisy v. Hardin* itself; for in that case the court says that if subjects of commerce are "directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them;" and in *Mugler v. Kansas*³ the Supreme Court has said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety, may be endangered by the general use of intoxicating drinks." In Canada, under the somewhat similar provision of the British North America Act of 1867, it is held that it is within the authority of a province to impose a license tax upon all persons selling spirituous liquors, and that such a tax is valid although applied to the sale of liquor imported from other provinces. Upon this question the Privy Council remarked that the provisions of the act in question were "in the nature of police or municipal regulations of a merely local character, for the good government of taverns, etc., licensed for the sale of liquors by retail, and, as such, calculated to preserve in the municipality peace, and public decency,

¹ *State v. Fulker*, 43 Kan. 237; *Commonwealth v. Clapp*, 5 Gray 97; *Collins v. Hill*, 77 Iowa, 181; *State v. Newton*, 50 N. J. L. 584; *Commonwealth v. Huntley*, 156 Mass. 286; *Commonwealth v. Gardner*, 133 Pa. St. 284; *Jones v. People*, 14 Ill. 196; *State v. Wheeler*, 25 Conn. 290; *Santo v. State*, 2 Iowa, 165, 202; *State v. Stucker*, 58 Iowa, 496; *Commonwealth v. Metropolitan Board, etc. v. Barrie*, 84 N. Y. 657; *Jones v. Surprise*, 64 N. H. 248; *Lang v. Lynch*, 88 Fed. Rep. 489.

² *Osborne v. Nicholson*, 1 Dill 219, 235; *Groves v. Slaughter*, 15 Pet. 449.

³ 123 U. S. 623, 663.

and to repress drunkenness and disorderly conduct, and as such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament."¹

Exclusion of Matter from the Mails by State Legislation. In 1835 a question substantially like that involved in *Bowman v. Railway Company* and *Leisy v. Hardin* was submitted to Postmaster-General Kendall when the Southern States demanded the exclusion of abolition documents from the United States mails.

Mr. Kendall expressed the opinion that the Federal government had not the right, under the Constitution, to introduce such matter within a State whose laws forbade it. "Heretical as the opinion may seem even to-day to most Americans," says Prof. Von Holst in his Constitutional History, "there can be no doubt that Kendall's argument on this point was to the purpose." . . . "Neither in Congress nor elsewhere has this been validly refuted." . . . "The state laws which interdicted the publications of the abolitionists, and branded the dissemination of them as a great crime, were not in conflict with the Federal Constitution."²

Mr. Kendall's argument, as given in his annual report to the President in December, 1835, is as follows:

"It is universally conceded that our states are united only for certain purposes. There are interests in relation to which they are believed to be as independent of each other as they were before the Constitution was formed. The interest which some of the people have in slaves is one of them." . . .

"Nor have the people of one state any more right to interfere with this subject in another state, than they have to interfere with the internal regulations, rights of property or domestic police of a foreign nation. If they were to combine and send papers among the laboring population of another nation, calculated to produce discontent and rebellion, their conduct would be good ground of complaint

¹ Bourinot, Const. Hist. Canada, p. 144.

² Const. Hist. of U. S., 1828-1846, pp. 125, 127.

on the part of that nation, and in case it were not repressed by the United States, might be, if persevered in, just cause of war. The mutual obligations of our several states to suppress attacks by their citizens on each other's rights and interests, would seem to be greater, because by entering into the Union they have lost the right of redress which belongs to nations wholly independent. Whatever claim may be set up or maintained to a right of free discussion within their own borders, of the institutions and laws of other communities over which they have no rightful control, few will maintain that they have a right, unless it be obtained by compact or treaty, to carry on discussions within those communities, either orally or by the distribution of printed papers, particularly if it be in violation of their peculiar laws and at the hazard of their peace and existence." . . . "It is not easy to perceive how citizens of Northern states can possess a claim to the privilege of carrying on discussions within the Southern states, by the distribution of printed papers, which the citizens of the latter are forbidden to circulate by their own laws." . . . "In the exercise of their reserved rights, and for the sake of protecting their interests and insuring the safety of their people, some of the states have passed laws prohibiting under heavy penalties, the printing or circulation of papers like those in question, within their respective territories. It has never been alleged that these laws were incompatible with the Constitution of the United States, nor does it seem possible that they can be so, because they relate to subjects over which the United States cannot rightfully assume any control under the Constitution, either by law or otherwise. If these principles are sound, it will follow that state laws on this subject are within the scope of their jurisdiction, the supreme laws of the land, obligatory alike on all persons, whether private citizens, officers of state or functionaries of the general government."¹

In his annual message of that year, President Jackson suggested to Congress "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."²

This matter was submitted to a committee of which John

¹ 49 Niles Reg. 277.

Papers of the Presidents, vol. III,

² 49 Niles Reg. 256; Messages and p. 175.

C. Calhoun was chairman, and by which, on February 4, 1836, a report was made to Congress accompanied by a bill to prohibit deputy postmasters from receiving and transmitting through the mail to any State papers whose circulation is prohibited by the laws of that State.

In view of the Wilson Act¹ this report has much present interest.

It denied that Congress had power to pass such a law as the President had suggested, and maintained that "the internal peace and security of the States are under the protection of the States themselves, to the entire exclusion of all authority and control on the part of Congress;" that "it belongs to them, and not to Congress, to determine what is, or is not, calculated to disturb their peace and security;" that if Congress might decide that year what were incendiary publications, it might decide next year what were not, and that it would be in its power, therefore, to open the gates of the States to any matter it might see fit to introduce, and to punish all who dared resist as criminals. The report maintained that when the States had determined what were incendiary publications, it was the duty of Congress to respect State laws on the subject, and, so far as practicable, to co-operate in their execution.²

The act reported declared that it should "not be lawful for any deputy postmaster in any State, Territory, or District, knowingly to deliver to any person whatsoever any pamphlet, newspaper, handbill or other printed paper or pictorial representation touching the subject of slavery, when by the laws of such State, Territory, or District, such circulation is prohibited."³

In anticipation of constitutional objections, Mr. Calhoun, in the report accompanying this bill, cites two precedents for such legislation by Congress.

¹ 26 Stat. L. 818; Supp. Rev. Stat., ch. 728, p. 779.

² Wilson's Rise and Fall of Slave Power in America, vol. 1, p. 824.

³ Calhoun's Works, vol. V, pp. 190, 197; vol. II, p. 509.

By the act of the 28th of February, 1803, masters or captains of vessels are forbidden, under severe penalty, "to import or bring or cause to be imported or brought, any negro or mulatto, or person of color, not being a native or citizen, or registered seaman of the United States, or seaman, natives of countries beyond the Cape of Good Hope, into any port or place which shall be situated in any State, which, by law, has prohibited, or shall prohibit, the admission or importation of such negro, mulatto or other person of color."

. . . To the same effect is the act of the 25th of February, 1799, respecting quarantine and health laws, which, among other things, "directs the collectors and all other revenue officers, the masters and crews of the revenue cutters and the military officers in command on the station, to co-operate faithfully in the execution of the quarantine and other restrictions which the health laws of the State may establish."¹

After a long struggle this bill was, on the 8th of June, 1836, defeated in the Senate by a small majority.

The Wilson Act.—Since that time there have been but two statutes of this character enacted by Congress. The first is the act of July 3, 1866,² providing that the transportation of and traffic in nitro-glycerine and other high explosives mentioned in the act may be regulated or prohibited by the States.

The second act referred to is that known as the Wilson Act of August 8, 1890.³ This statute provides:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or

¹ Calhoun's Works, vol. V, pp. 199, 200.

² 26 Stat. L. 813; Supp. U. S. Rev. Stat., ch. 728, p. 779.

³ U. S. Rev. Stat., p. 826, sec. 4290.

liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This enactment was at once challenged as an unconstitutional delegation of power. The commercial power of Congress is exclusive in all matters of national concern. The Wilson Act, it was said, was therefore intended to confer upon the States the very power which was denied to them by the Constitution.

It does not appear, however, either in the history of commercial regulations by Congress, or in the decisions of the Supreme Court, that the Federal power was ever understood to be exclusive in the sense intended by this argument. It was, for instance, during many years, the settled practice of Congress to grant the States on the seaboard leave to lay duties at their ports for the improvement of their harbors,¹—a delegation of commercial power expressly sanctioned by the Constitution, which is in some respects more remarkable than either of the instances cited by Mr. Calhoun.

The decisions of the Supreme Court make the rule clear that the Constitution does not contain an absolute prohibition which excludes all State regulations acting directly upon commerce, but that the prohibition is found in the implication which the court draws from the absence of Federal regulation,—of the congressional will that commerce shall be free. Congress, it is said, can neither delegate its own powers nor enlarge those of a State, but it may make such regulations that the subjects of commerce will fall within the operation of State laws enacted under powers which are not surrendered.²

There has been a difference of opinion, arising upon the construction of the Wilson Act, whether under its provisions a State can forbid the introduction of intoxicating liquors within its limits. Under the Iowa law, which forbids trans-

¹ Congressional Government, by Woodrow Wilson, p. 166. See *post*, p. 108.

² In *re* Rahrer, 140 U. S. 545; In *re* Spickler, 43 Fed. Rep. 653; *City of Indianapolis v. Bieler*, 138 Ind. 30.

portation of intoxicating liquor between points within the State unless the consignee is authorized under State law to sell at the point of consignment, it was held that liquor becomes subject to the police laws of the State the instant of crossing the State line, and that, thereafter, its transportation is unlawful.¹ The Federal statute, the Supreme Court of Iowa said, makes liquors upon arrival within a State subject to its police laws as fully as domestic liquors. It could not be questioned that if the liquor were received within the State line and carried from point to point in the State, in violation of State law, the act would be punishable. If foreign liquor, upon arrival in the State, is subject to its police laws to the same extent as domestic liquor, the act of transportation must be unlawful in one case when it is in the other.² Upon this theory it has been held — apparently upon the ground that the authority to forbid the importation of liquor from other States involves authority to forbid contracts for such importation — that the State may refuse the vendor the right to recover from the consignee the purchase price of liquor so imported when the contract was made wholly or partly within its limits.³

This construction of the statute is not adopted by the Supreme Court of the United States. The act does not authorize a State to forbid the introduction of intoxicating liquor, but recognizes the right of transportation and permits State laws to act upon the liquor only when carriage is complete. The provision that "liquor transported into any State or Territory . . . shall upon arrival" be subject to its police laws, if so construed as to forbid transportation of liquor across State lines, would give an extra-territorial effect to State laws and make "arrival" itself unlawful. It is therefore settled that the Wilson Act does not operate upon

¹State v. Rhodes, 90 Iowa, 496.

v. Fraser, 1 N. D. 425; South Caro-

²State v. Rhodes, 90 Iowa, 496;

lina v. City of Aiken, 42 S. C. 222.

In re Spickler, 43 Fed. Rep. 653; In
re Van Vliet, 43 Fed. Rep. 761; State

³Starace v. Rossi, 69 Vt. 808; Beverwyck Brewing Co. v. Oliver, 69 Vt. 323; Jones v. Hard, 82 Vt. 481.

liquor brought into a State until its destination has been reached and it is delivered to the consignee.¹ Contracts which contemplate nothing more than the transportation of liquor into a State are therefore lawful. So an action may be maintained to recover the price of liquor shipped into a State, although the consignee be not at liberty, under the State laws, to sell it.² On the other hand, contracts which contemplate the sale of liquor contrary to State police laws are unlawful, and the State may refuse to permit recovery upon them.³

The statute which bears the closest analogy to the Wilson Act is that making high explosives carried from State to State subject to the jurisdiction of the States through which they pass. In this instance Congress has expressly authorized the States to prohibit the introduction of such articles within their limits.⁴ Had it been intended to permit the same authority over intoxicating liquors, the language would probably have been equally unmistakable.

The Wilson Act applies only to State police laws. It does not, and could not under the Constitution, authorize State regulation of interstate traffic for purposes of commerce or revenue.

To establish the validity of State regulations under this act, it is therefore necessary to show not only that the regulation in question has a real and substantial relation to purposes within the scope of the police jurisdiction, but also that in its operation it does not establish restrictions of an essentially commercial character.

South Carolina Dispensary Law.—This phase of the subject received attention in the litigation over the South Caro-

¹ Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. Rep. 664; In re Langford, 57 Fed. Rep. 570; Ex parte Edger-ton, 59 Fed. Rep. 115; In re Jervey, 66 Fed. Rep. 957; Jervey v. South Carolina, 66 Fed. Rep. 1013; Bluthenthal v. Southern Ry. Co., 84 Fed. Rep. 920.

² Carstairs v. O'Connell, 154 Mass. 357.

³ Fred Miller Brewing Co. v. Stevens, 102 Iowa, 60, 71 N. W. Rep. 186.

⁴ Rev. Stat., sec. 4280.

lina Dispensary Law. There is no doubt that the law contained many provisions within the scope of the police jurisdiction. It forbade the sale of liquor on Sunday, or to minors or intoxicated persons, and these, as well as others of its provisions, are recognized police laws, such as are common in States where the sale of liquor is not prohibited.

The law went beyond these restrictions, however, and forbade the sale of intoxicating liquor within the State by any private individual, giving the whole traffic to the State as a monopoly. The sale and use of liquor was not forbidden, but was facilitated. Officers were appointed throughout the State to dispense liquor at convenient points, and the profit arising from the business went into State, county and municipal treasuries.

Such a law as this, it was said, established a commercial monopoly. The legislature undoubtedly intended by this means to prevent some evils which result from the general use of intoxicating liquors; but, as was said by Mr. Justice Story, it is one question whether a means be adapted to serve the State, and quite another question whether it be within its jurisdiction. A State cannot make a regulation of commerce to enforce its police laws, for such a regulation is a means withdrawn from its authority.¹

The Supreme Court of South Carolina held, therefore, that the Dispensary Act was void.²

This decision has since been overruled,³ but its doctrine is to some extent still approved in the Federal courts. A police law, it is said, may forbid the general use of intoxicating liquors, and may provide equal regulations acting upon domestic and imported liquors; but a State cannot establish a system which in effect discriminates between interstate and domestic commerce in articles whose manufacture and use are lawful. A State cannot forbid the importation of liquors

¹ *New York v. Miln*, 11 Pet. 102, 157.

² *McCullough v. Brown*, 41 S. C. 220.

³ *State v. City Council of Aiken*, 42 S. C. 222; *State v. Potterfield*, 47 S. C. 75. See *Cantini v. Tillman*, 54 Fed. Rep. 969.

for use by the importer while it permits the use of domestic liquors.¹ This decision was affirmed in the Supreme Court.²

It seemed that the result of these decisions was to hold that the South Carolina statute was not such a police law as fell within the operation of the Wilson Act, and that its provision prohibiting the sale in original packages of liquors brought from other States or from foreign countries was invalid. So long as the State itself sold intoxicating liquors for use as a beverage, it was argued it could not prohibit others from engaging in the same traffic.³

In *Vance v. Vandercook Company*⁴ this inference was denied by the Supreme Court, and it was held the fact that the State law permitted the sale of liquor, subject to certain restrictions, did not prevent the law from being an exercise of the police power. The purpose of the Wilson Act, it was said, was to allow State regulations to operate upon the sale of original packages of intoxicants brought from other States, and this operation would be prevented were the act so construed as to permit a State to control sale only by prohibition. This decision permits importation of intoxicating liquors for use by the importer, while their importation for sale is left within the operation of the Wilson Act and the resulting State jurisdiction.

In its operation upon police laws of different States, the Wilson Act confers no additional authority, but removes an impediment to the operation of State law. Statutes enacted before the passage of the Wilson Act were therefore not void, but only inoperative, and became effective at once upon the passage of the Federal statute.⁵

¹ Donald v. Scott, 76 Fed. Rep. 554, 559, 74 Fed. Rep. 859, 67 Fed. Rep. 854.

² Scott v. Donald, 165 U. S. 58.

³ Vandercook Co. v. Vance, 80 Fed. Rep. 786; Moore v. Bahr, 82 Fed. Rep. 19.

⁴ 170 U. S. 488, 18 Sup. Ct. Rep. 674.

⁵ Tinker v. State, 90 Ala. 638; State v. Lord, 66 N. H. 479; In re Rahrer, 140 U. S. 545; Commonwealth v. Calhane, 154 Mass. 115; State v. Fraser, 1 N. D. 425; Bailey Liquor Co. v. Austin, 82 Fed. Rep. 785.

Definition of an Original Package.—In general terms, an original package may be defined as the unbroken package in the condition in which it was received by the carrier and transported.¹ In the case of cigars and cigarettes, Congress has in effect prescribed by statute what shall be considered an original package.²

When intoxicating liquors in bottles are packed in boxes, each containing one bottle, and shipped separately into a State, each separate bottle constitutes an original package.³ Where liquor is transported in bottles, wrapped in paper, separately addressed, and transported by the carrier, lying loose upon the floor of a car, or in open boxes attached thereto, the bottles constitute original packages.⁴ In two cases in Iowa it was held that where bottles of liquor were packed in barrels and boxes and transported into a State, the bottles were the original packages, and were within the protection of the Federal commercial law after they had been removed from the barrels and boxes.⁵ A somewhat similar decision was made in regard to cigarettes in the case of *In re May*.⁶ The Iowa cases have been overruled on this point,⁷ and the weight of authority is in favor of the rule that under such circumstances the boxes or barrels are the original packages.⁸

¹ *McGregor v. Cone* (Iowa), 73 N. W. Rep. 1041; *United States v. One Hundred Thirty-two Packages*, 76 Fed. Rep. 364; *State v. Board of Assessors*, 46 La. Ann. 145; *State v. Winters*, 44 Kan. 723.

² U. S. Rev. Stat., sec. 3392, amended by act of March 1, 1879, 20 Stat. L. 347, Supp. R. S. 864; *State v. Goetz* (W. Va.), 27 S. E. Rep. 225; *In re Minor*, 69 Fed. Rep. 233; *State v. McGregor*, 76 Fed. Rep. 956. *Conf. In re May*, 82 Fed. Rep. 422. *Contra*, *McGregor v. Cone* (Iowa), 73 N. W. Rep. 1041.

³ *In re Beine*, 42 Fed. Rep. 545.

⁴ *Keith v. State*, 91 Ala. 2.

⁵ *State v. Coonan*, 82 Iowa, 400; *State v. Miller*, 86 Iowa, 638.

⁶ 82 Fed. Rep. 422.

⁷ *McGregor v. Cone* (Iowa), 73 N. W. Rep. 1041.

⁸ *Guckenheimer v. Sellers*, 81 Fed. Rep. 997; *In re Harmon*, 48 Fed. Rep. 372; *In re Wilson*, 19 D. C. 341; *Keith v. State*, 91 Ala. 2; *Harison v. State*, 91 Ala. 62; *Smith v. State*, 54 Ark. 248; *Collins v. Hills*, 77 Iowa, 181; *State v. Parsons*, 124 Mo. 436; *Haley v. Nebraska*, 42 Neb. 556; *Commonwealth v. Bishman*, 188 Pa. St. 639; *State v. Chapman*, 1 S. Dak. 415; *City Council v. Ahrens*, 3 Strobb. (S. C.) 241.

In one case, where liquor was imported in sealed bottles and sold in that condition to the purchasers, who opened them, drinking the contents from glasses provided by the seller, and leaving the bottles with the seller, it was held that the transaction was not a sale of original packages, but of their contents, and was therefore subject to State regulation.¹

Original Packages May be of Any Size.—We have already seen that since the decision of *Leisy v. Hardin* there has been a strong disposition to qualify the rule therein stated or to limit its application. It has been said, therefore, that the question what constitutes an original package is one partly of good faith, and that the package must be such as is used by producers and shippers for their convenience and security in transporting their wares in the ordinary course of business.² This doctrine has not met with the general support of the courts. In the absence of regulation by Congress, the importer may determine for himself the form and size of the package which he buys.³ The right of the importer to sell his goods is the same whether his dealings are by retail with the consumer, or by wholesale with other merchants.⁴

Importation in Violation of Law.—It has been held that, if articles are imported from foreign countries without compliance with Federal law, State jurisdiction is not excluded when they come within its territorial limits.⁵

Extent of State Jurisdiction Over Original Packages.—The right given by the commerce clause to bring articles

¹ *Hopkins v. Lewis*, 84 Iowa, 690.
Conf. Fuqua v. Pabst Brewing Co.,
90 Tex. 298.

² *Commonwealth v. Paul*, 170 Pa. St. 284; *Commonwealth v. Schollenberger*, 170 Pa. St. 296; *Commonwealth v. Schollenberger*, 156 Pa. St. 201; *Commonwealth v. Zelt*, 188 Pa. St. 615; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

³ *Guckenheimer v. Sellers*, 81 Fed. Rep. 997; *In re Beine*, 49 Fed. Rep. 545; *State v. Winters*, 44 Kan. 723; *Tinker v. State*, 96 Ala. 115; *State v. Board of Assessors*, 46 La. Ann. 145.

⁴ *Schollenberger v. Pennsylvania*, 18 Sup. Ct. Rep. 757.

⁵ *State v. Wade*, 68 Vt. 80.

into a State is limited to those subjects of trade and commerce which are transported for proper commercial purposes. Weapons and drugs are subjects of commerce under ordinary circumstances, but not when carried with wrongful purpose. So while, under ordinary circumstances, liquor is a subject of commerce, it is only so regarded when put to commercial use. A State law punishing the sale of intoxicating liquors to persons of known intemperate habits,¹ or fixing the hours within which liquor may be sold, and forbidding its sale for consumption on the premises,² may therefore be applied to sales of original packages of imported liquors.

So a law providing for seizure and forfeiture of liquors which are held for sale in violation of State regulations has been applied to liquor brought from other States in possession of the importer and in original packages, where it was shown that the intention of the owner was not to sell in the condition of importation, but to break the package and sell in small quantities.³ A State may prohibit the sale of liquor on Sunday, and this is a valid exercise of the police power of the State, even as applied to the importer selling in the original packages.⁴

Effect of Breaking a Package.—When an original package is broken it becomes subject to State jurisdiction.⁵ It has been said, however, that the fact that the lid of a package has been removed, so that its contents may be examined, is not such a breaking as will destroy its original character;⁶

¹ Commonwealth v. Zelt, 188 Pa. St. 615; Commonwealth v. Silverman, 188 Pa. St. 642.

² Moore v. Bahr, 82 Fed. Rep. 19.

³ State v. Intoxicating Liquors, 65 Me. 556. See Knowlton v. Doherty, 87 Me. 518.

⁴ On general subject, see *post*, pp. 178, 226, 329; Dorman v. State, 34 Ala. 216; Moore v. Bahr, 82 Fed. Rep. 19.

⁵ Leisy v. Hardin, 185 U. S. 100; Brown v. Maryland, 12 Wheat. 419;

Stommel v. Timbrel, 84 Iowa, 336; Commonwealth v. Paul, 148 Pa. St. 559; Commonwealth v. Bishman, 138 Pa. St. 639; Western Paper Bag Co. v. Johnson (Tex. Civ. App.), 38 S. W. Rep. 364; Smith v. People, 1 Parker's Cr. Rep. 588; Wynhamer v. People, 20 Barb. 567; Wynn v. Wright, 1 Dev. & B. (N. C.) 19; Commonwealth v. Kimball, 24 Pick. 359; People v. Quant, 2 Parker's Cr. Cas. 410.

⁶ In re McAllister, 51 Fed. Rep. 282.

and the drawing of a bung from a barrel to obtain a small quantity of its contents for testing is not a breaking of the package.¹

Effect of Sale by Importer.—The cases agree that when an article is sold by the importer it loses its distinctive character as an import and becomes part of the general mass of property in the State, and subject to its police and taxing power,² so long as no discrimination is made against it on account of its foreign origin.³ Where an importer of liquors executes a mortgage thereon which is foreclosed while the cask is in bond in a United States warehouse, and the purchaser at the foreclosure sale pays the duties and receives the cask, the goods are no longer in first hands, but have become subject to the jurisdiction of the State.⁴

THE FEDERAL COMMERCIAL POWER IN RELATION TO THE CARRIER.

The Federal power over commerce extends not only to the goods which are transported, but "also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."⁵

Even carriers engaged in transportation from point to point in the same State are within Federal control so far as they are engaged in interstate commerce.

Domestic Carriers on Navigable Waters.—Transportation upon high seas, or upon navigable waters of the United

Wind v. Her, 93 Iowa, 316. Conf. Wasserboehr v. Boulter, 84 Me. 165.

² Brown v. Maryland, 12 Wheat. 449; Waring v. The Mayor, 8 Wall. 110; Schollenberger v. Pennsylvania, 171 U. S. 1; McGregor v. Cone (Iowa), 73 N. W. Rep. 1041; In re McAllister, 51 Fed. Rep. 232; State v. Shapleigh, 27 Mo. 334; State v. Robinson, 49 Me. 285; People v. Quant,

2 Parker's Cr. Cas. (N. Y.) 410; Wynhamer v. People, 20 Barb. 567; State v. Peckham, 3 R. I. 289; City Council v. Aherna, 4 Strobb. (S. C.) 241; McGuinness v. Bligh, 11 R. I. 94.

³ Welton v. Missouri, 91 U. S. 275, 282; McCreary v. State, 78 Ala. 490.

⁴ King v. McEvoy, 4 Allen, 110.

⁵ Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204.

States, necessarily connects itself with foreign and interstate transportation, and is within the Federal commercial power even as between points in the same State. The safety of navigation requires that vessels operating upon the same waters shall be subject to the same rules, and shall be under substantially similar obligations. Regulations of this character extend not only to the rules of the road, the subject of signal lights and the licensing of officers, pilots and engineers, but for their enforcement involve regulation of the registry and enrollment of vessels, and the means by which title thereto may be passed. In *Lord v. Steamship Co.*¹ suit was brought against the owner of a vessel engaged in transportation from San Francisco to San Diego, to recover the value of freight lost, and it was contended that the provision of the Federal statutes limiting the liability of owners of vessels for loss or destruction of freight had no application to transportation between points in the same State. It was held, however, that transportation upon the high seas was necessarily national in character and within the Federal control. The vessel was navigating with the vessels of other nations, and, while not trading with them, was engaged in commerce with them. If, in the course of her voyage, she inflicted a wrong upon another country, the Federal government would be responsible. Such navigation is clearly a matter of national concern, and subject to national control. In *Pacific Coast Steamship Co. v. Board of Commissioners*,² the same rule was applied to State regulation of rates for transportation by sea between points in the same State. Such transportation, it was said, is under the exclusive control of Congress. Only that transportation which is within the State during its entire voyage is subject to its regulation.

As the ocean is an international highway, so the navigable waters of the United States are national highways, and subject to Federal control. State regulations of domestic commerce may not, therefore, be given an operation which will embarrass the carrier in its relations to the vessels of other

¹ 102 U. S. 541.

² 18 Fed. Rep. 10.

States and interfere with the operation of Federal laws. Thus, in *Hall v. DeCuir*,¹ it was held that a statute of Louisiana requiring equal and separate accommodations for whites and negroes could not determine the accommodations which should be given to a passenger traveling from point to point in Louisiana by an interstate carrier operating on the Mississippi river. If one State could require that the accommodations should be separate, another State might with equal justice require that the two races should share the same accommodations. On one side of the river the carrier would be subject to one set of rules and on the other side to another. Commerce could not flourish in the midst of such embarrassments.

In the case of railways, compliance may be made with such a statute by adding to trains within the state a separate car for colored passengers. "This may cause an extra expense to the railroad company; but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State." These regulations, so long as they do not operate upon interstate passengers, are valid.²

A State statute which attempts to determine whether interstate passengers should, in any portion of their journey, share their accommodations with passengers of another race, seeks to regulate interstate commerce in matters which belong to Congress alone.³

Domestic Commerce by Land Through Other States.—A similar rule has been applied to transportation by land from point to point in the same State, passing through another State.

The conditions under which such transportation is conducted differ widely from the conditions which surround

¹ 95 U. S. 485.

² *Anderson v. Louisville, etc. Ry.*

³ *Louisville, etc. Ry. Co. v. Mississippi*, 133 U. S. 587.

Co., 62 Fed. Rep. 46; *Carrey v. Spencer*, 72 N. Y. St. Rep. 106.

navigation; and yet it is apparent in one case, as in the other, that the transportation is not a matter which concerns alone the domestic affairs of a single State, but is a part of that commerce extending beyond State lines which is within Federal jurisdiction.

It is probable, however, that the difference is on one side of the line only. In the case of commerce commencing in Pennsylvania and passing through New York, it is immaterial, in measuring the powers of the latter State, whether the commerce terminates in Pennsylvania or in Ohio. In measuring the powers of Pennsylvania, however, this fact is of great importance. If goods are transported from point to point in the State, all matters relating to their purchase and sale concern that State alone, and the Federal power is involved only to the extent of securing free transportation.

The cases which have arisen on this subject have involved validity of State regulation of freights, and of State taxation. In one of the cases the question concerned the validity of regulations of freight established by the Railroad Commission of Minnesota for transportation from Duluth to St. Paul, passing more than half the distance through the State of Wisconsin.

The expense of transportation depends largely upon rates of taxation, obligations and responsibilities imposed by law upon railway companies in different jurisdictions, and each State in its legislation must take into consideration these facts, and the physical geography of the country, the density of its population and amount of business. What is a proper charge for transportation in one State may, therefore, not be reasonable in another.¹

In the case referred to it was held that Minnesota could not fix the rates in question.² In *Sternberger v. Cape Fear*

¹ *Covington, etc. Turnpike Co. v. Sandford*, 164 U. S. 578, 598; *Swift v. Philadelphia, etc. R. R. Co.*, 58 Fed. Rep. 858, 860.

² *State v. Railroad Co.*, 40 Minn. 267; *New Orleans Cotton Exchange v. N. O. & T. P. Ry. Co.*, 2 Int. Com. Rep. 512.

& *Y. V. R. R.*¹ a similar question arose, and was decided against the power claimed by the State. In that case goods had been shipped from one point to another in South Carolina and carried over five railroads, two of these roads being wholly within the State, one being wholly outside the State, and two being partly within and partly without. It is clear that the State had no jurisdiction over the road which was entirely without her territory. The consequence was that, whatever might be its power over roads partly or wholly within its boundaries, it could not enforce orders which concerned a road in another State; and, so far as concerned the two roads which were partly within and partly without its limits, its jurisdiction was necessarily limited by the equal power of a sister State.

It is apparent, too, that the power of the State in such cases does not depend upon the number of carriers concerned. If the whole transportation were conducted by one corporation, which might or might not be in competition with two or more carriers making a joint rate, its duties and the powers of the State would be the same. It seems, therefore, that a State cannot regulate charges for such transportation.²

These decisions have not been followed in Missouri, North Carolina and Iowa, where it has been held that a State within whose limits transportation begins and ends may regulate the rates for such carriage both as to amount³ and by prohibiting a greater charge for a short distance than for a longer distance under circumstances substantially similar.⁴

The courts by which these cases were decided considered

¹ 29 S. C. 510.

² *Lord v. Steamship Co.*, 102 U. S. 541; *Pacific Coast S. S. Co. v. Board*, 18 Fed. Rep. 10; *Milk Producers' Ass'n v. Delaware, etc. Ry. Co.*, 7 Int. Com. Rep. 92. *Conf. New Orleans Cotton Exchange v. Railway Co.*, 2 Int. Com. Rep. 289.

³ *Campbell et al., Railway Com-*

missioners, v. Chicago, etc. Ry. Co., 86 Iowa, 587; *State ex rel. Commissioners v. Western Union Tel. Co.*, 118 N. C. 218; *Leavell v. Western Union Tel. Co.*, 116 N. C. 211. *Conf. Burlington, C. R. & N. R. Co. v. Dey*, 83 Iowa, 812.

⁴ *Seawell v. Kansas City, etc. Ry. Co.*, 119 Mo. 222.

the question controlled by the decision in *Lehigh Valley R. R. Co. v. Pennsylvania*.¹ That case involved State taxation of gross earnings of the railway company within the State. The receipts upon which the dispute arose were derived from transportation from Mauch Chunk, in Pennsylvania, through New Jersey to Philadelphia, and the tax, being proportioned to the mileage within the State, would be sustained, even if levied upon receipts derived from transportation from one State to another.² It is not certain, however, that regulation of interstate rates will always be sustained in cases where taxation of such rates will be. The transportation is a unit, and the rate charged is a unit,—a single fare for a single service. A part of the rate which fairly represents travel within the State may perhaps be taxed without reference to the part which is earned outside the State;³ but partial regulation is impossible.⁴ Furthermore, it should be noticed that, apart from the possible difference between taxation and regulation of rates, there is, since the passage of the Interstate Commerce Act, an express limitation upon the powers of the State to regulate rates which does not exist in the taxation of rates. It seems, therefore, that the Lehigh Valley case does not support State regulation of interstate rates, and that, as concerns this subject, the rule which will probably be followed is that announced in the earlier cases.

Carriers Operating Within a Single State.—It is well established that when a commodity has been delivered to a common carrier for continuous transportation to a point beyond the limits of the State, interstate or foreign commerce has begun. If a carrier is engaged in such transportation, it is, to that extent, engaged in interstate or foreign commerce,⁵

¹ *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192; *Commonwealth v. Lehigh Valley R. R. Co.*, 129 Pa. St. 308; *Lehigh Valley R. R. Co. v. Commonwealth*, 1 Monaghan, 45.

² *Maine v. Grand Trunk R. R. Co.*, 142 U. S. 217.

³ *Maine v. Grand Trunk R. R. Co.*, 142 U. S. 217.

⁴ *Wabash R. R. v. Illinois*, 118 U. S. 557. *Conf. Dillon v. Erie R. R.*, 43 N. Y. Supp. 320.

⁵ *Houston, etc. R. R. Co. v. Dumas* (Tex. Civ. App.), 43 S. W. Rep. 609.

notwithstanding that its operations are confined within the limits of a single State, and that it does not operate in connection with any carrier whose line extends beyond.¹ Thus, it has been held that a license fee imposed by the city of Chicago upon tug-boats enrolled and licensed under Federal law, and employed in towing vessels into and through the harbor of Chicago and along the Chicago river, is in conflict with the exclusive powers of Congress to regulate commerce.²

Independent carriers operating wholly within a single State, not in connection with an interstate carrier, may possibly present questions somewhat different from those presented by the tug-boat. The independent carrier, it is said, is not bound to assume responsibilities for carriage beyond its line. It may receive from, and deliver to, other carriers, as it receives from and delivers to merchants.

That the consignor may be a carrier which has brought goods within the State, and forwards them as part of a continuous act of transportation, or that the consignee may be a carrier taking the goods beyond the State, does not, it is said, bring the domestic carrier within Federal control, or alter its obligations. Until by its own act it becomes a party to transportation across State lines, its service is the same for all, and, being limited to points within a single State, is of no different character when performed for individuals than it is when performed for other carriers.³

In *Railroad Co. v. Interstate Commerce Commission*,⁴ commonly known as the Social Circle case, this question was argued but not decided. The current of decisions indicates that the question whether a carrier is engaged in

¹The *Daniel Ball*, 10 Wall. 557, *leaves v. Tow Boat Co.*, 33 La. Ann. 565; *Mattingly v. Pennsylvania*, 2 647.

Int. Com. Rep. 806; *Ex parte Koehler*, 30 Fed. Rep. 867; 25 Fed. Rep. 91.

²*Harmon v. City of Chicago*, 147 U. S. 396; *Foster v. Davenport*, 22 How. 244. *Conf. City of New Or-*

³*Heiserman v. Railroad Co.*, 63 Iowa, 732; *Railway Co. v. Sherwood*, 84 Tex. 135; *The Thomas Swan*, 6 Ben. 42; *The Bright Star*, 1 Wool. 266.

⁴162 U. S. 184.

interstate commerce is one of fact, and is not determined by the declaration of the carrier, or the form in which its contract is made. The obligation to receive and transport goods and persons extends as much to those destined to points beyond the State as to those within. The question whether a carrier is engaged in interstate commerce depends, therefore, not alone upon its voluntary act, but upon the destination of that which is carried. If a carrier, by contracting only for transportation upon its own line within a State, might keep without Federal jurisdiction, there would arise a method of conducting commerce beyond the effectual control either of the Federal government or that of the States.

In *Houston Direct Navigation Co. v. Insurance Co.*¹ it was shown that the Navigation Company was engaged in transportation between Houston and Galveston, the freight being received for delivery to the Mallory Steamship Line, by which it was to be transported to New York and from there to Liverpool. The Navigation Company gave a bill of lading from Houston to Galveston only. It did not participate in through rates, and assumed no liability beyond its own line. At the time of the delivery of the freight to the Navigation Company, however, its final destination was beyond the limits of the State, and it was shown from the bill of lading, and from other testimony, that a continuous voyage was contemplated. Upon these facts it was held that the transportation from Houston to Galveston was one of the operations of interstate commerce and within Federal jurisdiction.² This is also the conclusion which the Interstate Commerce Commission adopted in several cases. In *Board of Trade of Troy v. Alabama Midland Ry.*³ the Commission said that under any other rule the most vital pro-

¹ 89 Tex. 1.

App.), 43 S. W. Rep. 614; Gulf, etc.

² *Houston Direct Navigation Co. v. Insurance Co.*, 89 Tex. 1; *State v. Gulf, etc. Ry. Co.* (Tex. Civ. App.), 44 S. W. Rep. 542. *Conf. Galveston, etc. Ry. Co. v. Armstrong* (Tex. Civ.

Ry. Co. v. Barry (Tex. Civ. App.), 45 S. W. Rep. 814.

³ 4 Int. Com. Rep. 348; *Georgia R. Com. v. Clyde S. S. Co.*, 4 Int. Com. Rep. 120.

visions of the Federal law might be evaded. "For instance, a terminal carrier, part of a continuous through line, could elect to charge on through traffic its local rate to one or any number of stations on its road and a less through rate to stations beyond, and no violation of law could be alleged because as to the short haul the carrier would not be subject to the Act. The charge of a local rate and declaration by a carrier that as to through transportation to certain points on its road it is a local carrier, cannot alter the fact." . . . "The facts, that the carriage is continuous, that the traffic is through interstate traffic and that the carrier in due and ordinary course of business accepts and forwards it, are sufficient to establish responsibility under the law."

The transportation wholly within a State which is beyond the jurisdiction of Congress is that which, in fact, originates and ends in the State. It may often be that the carrier's service is confined to the limits of a single State; but if, in performing this service, it is an instrument of commerce among the States, it is subject to Federal control for all the purposes of that commerce.¹

The fact that each carrier uses its own way-bill does not prevent the transportation from being interstate.² The through bill of lading is a facility, but not a necessity for the interchange of freight.³

To constitute interstate transportation of passengers it is not necessary that through tickets be used⁴ or that through rates be made.⁵

¹ *Mattingly v. Pennsylvania Co.*, 527; *Cutting v. Florida Ry. & Navigation Co.*, 46 Fed. Rep. 641; *Ex parte Koehler*, 80 Fed. Rep. 867; *Houston Direct Navigation Co. v. Insurance Co. of North America*, 89 Tex. 1, reversing (Tex. Civ. App.) 81 S. W. Rep. 560, 685. Conf. *The Daniel Ball*, 10 Wall. 557; *United States v. Steamboat "Sunswick"*, 15 Int. Rev. Rec. 154; *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. Rep. 522; *Cutting v. Florida Ry. & Nav. Co.*, 46 Fed. Rep. 641; *Ex parte Koehler*, 80 Fed. Rep. 867.

² *Hardy v. Atchison, T. & S. F. Ry.*, 82 Kan. 698.

³ *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. Rep. 522,

⁴ *Pacific Steamboat Co. v. Board of Railway Commissioners*, 18 Fed. Rep. 10.

⁵ *Augusta S. R. Co. v. Wright-*

Extent of Interstate Commerce Act.—The Interstate Commerce Act is limited in its operations to carriers under common control, management or arrangement for continuous carriage or shipment beyond the limits of a single State. Transportation conducted by a carrier within a State, and without conventional division of charges or other common control or arrangement, is not within the purview of this act.¹

Common Control.—Where a domestic carrier, by any arrangement with connecting lines, joins in interstate commerce, as by transporting traffic under through bills of lading for continuous carriage, it comes within the provision of the law, although no previous formal contract has been made.² Where a railroad forms a part of a through route between States,³ or joins in making a through rate,⁴ it subjects itself to the Interstate Commerce Act, and may not limit its effect to certain points on its road and exclude other points.⁵

Handling at Terminal Points.—The fact that shipments have not left the place of origin, or that they have reached the place of destination, does not necessarily exclude Federal jurisdiction. The right of Congress to control interstate

ville & T. R. Co., 74 Fed. Rep. 522; Houston Direct Navigation Co. v. Insurance Co. of North America, 89 Tex. 1, reversing (Tex. Civ. App.) 31 S. W. Rep. 560, 685; Board of Trade of Troy, Ala., v. Alabama Midland Ry. Co., 4 Int. Com. Rep. 348. Conf. Cincinnati, N. O. & P. R. Co. v. Interstate Commerce Commission, 163 U. S. 184.

¹ United States ex rel. Int. Com. Com. v. Chicago K. S. R. Co., 81 Fed. Rep. 788; Int. Com. Com. v. Belaire, Z. & C. R. Co., 77 Fed. Rep. 942; New Jersey Fruit Exchange v. Central Ry. Co., 3 Int. Com. Rep. 84.

² Cincinnati, etc. Ry. Co. v. Int.

Com. Com., 163 U. S. 184; Trammell v. Clyde S. S. Co., 4 Int. Com. Rep. 121; Board of Trade v. Alabama Midland Ry. Co., 4 Int. Com. Rep. 348. Conf. Ft. Worth, etc. Ry. Co. v. Whitehead, 6 Tex. Civ. App. 595; Houston, etc. Ry. Co. v. Dumas (Tex. Civ. App.), 43 S. W. Rep. 609.

³ Norfolk & Western Ry. Co. v. Commonwealth, 136 U. S. 114; United States v. B. & A. R. Co., 15 Fed. Rep. 209; United States v. Seaboard Ry. Co., 83 Fed. Rep. 568.

⁴ Texas & P. R. Co. v. Avery (Tex. Civ. App.), 33 S. W. Rep. 704.

⁵ Cincinnati, etc. Ry. Co. v. Int. Com. Com., 163 U. S. 184.

commerce is not limited to the actual transportation, but covers necessary handling and delivery of that commerce at terminal points.

The switching and delivering of freight by railroads is regulated by the Interstate Commerce Act.¹ Where switching of interstate freight is done by a carrier which joins in a common control, management or arrangement for a continuous carriage, the Federal act excludes State control,² though damages may be recovered in a State court for breach of the carrier's common-law duty to make a customary delivery on a side track.³ But if the carrier does not join in the interstate transportation so as to come within the act, but renders an independant switching service in a single State, such switching may be regulated by that State as a local matter.⁴

TRANSPORTATION UPON NAVIGABLE WATERS.

The Constitution provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, but no corresponding legislative authority is granted to Congress. The implication seems to be that the jurisdiction given to the courts was chiefly to enforce the general maritime and international law,⁵ although to some extent Congress might legislate upon the subject under the powers which had been specifically granted to it.

When the Constitution was framed admiralty jurisdiction was limited to tide-waters, and these were, for the most part, accessible to vessels of foreign nations.⁶ With the growth of

¹ *Fielder v. Missouri, K. & T. Ry.* Fed. Rep. 849. See also *Iowa v. Co. (Tex. Civ. App.)*, 42 S. W. Rep. 362; *Walker v. Keenan*, 73 Fed. Rep. 391.

⁵ *The Federalist*, LXXX; *The Moses Taylor*, 4 Wall. 480.

² *Fielder v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.)*, 42 S. W. Rep. 362.

⁶ *The Thomas Jefferson*, 10 Wheat. 428; *Moore v. American Transportation Co.*, 24 How. 1.

³ *Id.*

⁴ *Chicago, etc. Ry. v. Becker*, 83

traffic upon the internal waters of the country, the necessity for the extension of admiralty jurisdiction over all navigable waters, whether influenced by tide or not, became apparent. It was not, however, until 1851, by the decision in *Genesee Chief v. Fitzhugh*,¹ that admiralty jurisdiction was extended to waters beyond reach of the tides.

The language and decisions of the court, it was said, whenever a question of admiralty jurisdiction had come before it, had seemed to imply that under the Constitution admiralty jurisdiction was confined to tide-waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated had grown stronger every day, with the growing commerce on the lakes and navigable rivers of the Western States, and the difficulty which the language of the court had thrown in the way of extending it to these waters was, perhaps, the cause of the inquiry whether the power of Congress could not be supported under the authority to regulate commerce. The statute which was involved in the case, however, contained no regulation of commerce nor any provision in relation to shipping or navigation on the lakes. It conferred a new jurisdiction on the district courts with reference to vessels on the lakes and rivers, and such an enactment is not a regulation of commerce. Jurisdiction to entertain commercial causes gives a court power to expound the laws by which commerce is regulated, but the decisions of the court are not regulations. The statute, therefore, if valid, must be supported upon the ground that the lakes and navigable waters within the country are subject to the admiralty jurisdiction. It was evident, the court said, that a definition which would exclude the Federal power from these waters would be inadmissible. There were within the United States thousands of miles of navigable water, including lakes and rivers, in which there is no tide, and there could be no reason for admiralty jurisdiction over a public tide-water which would not apply with equal

¹ 12 How. 443.

force to any public water used for commercial purposes and interstate or foreign trade.¹

Extension of the admiralty jurisdiction of the Federal government over waters within the country involved an extension of the legislative power of Congress. It was not possible that the body of law should remain forever unalterable, nor that such changes as were necessary should be introduced only by judicial decisions.² Under earlier decisions which followed the case of *Genesee Chief*, it was suggested that the power of Congress was derived from its power over interstate and foreign commerce. "The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the larger portion of ground covered by the former." . . . "The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams."³

It was clear, however, that no legislative power would be adequate unless it was as extensive as the admiralty jurisdiction given to the courts. All jurisdiction over admiralty cases had been taken from State governments.⁴ The necessities of the case, therefore, required legislation by Congress, and this legislation the courts finally supported. The Federal legislative power, the court said, "is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."⁵

¹ *Genesee Chief v. Fitzhugh*, 12 How. 448; *Barney v. Keokuk*, 94 U. S. 324. *Butler v. Boston Steamship Co.*, 130 U. S. 527, 555.

² *The Lottawanna*, 21 Wall. 558, 577.

³ *The Lottawanna*, 21 Wall. 558, 577; *Stockton, etc. v. B. & N. Y. R. Co.*, 32 Fed. Rep. 9, 20; *Gilman v. Philadelphia*, 3 Wall. 718, 724; *Allen v. Newberry*, 21 How. 244;

⁴ Act of Sept. 24, 1789, U. S. Rev. Stat., sec. 568; *The Hine v. Trevor*, 4 Wall. 555; *The Moses Taylor*, 4 Wall. 411; *Stewart v. Harry*, 3 Bush, 488; *The Barque Chusan*, 2 Story, 455.

⁵ *In re Garnet*, 141 U. S. 1, 12. See *Providence & N. Y. S. S. Co. v. Hill Manuf. Co.*, 109 U. S. 578.

Extent of Federal Jurisdiction Over Navigation.—The jurisdiction of the United States over transportation by water and over the waters themselves is derived, therefore, not alone from the commerce clause, but also from the admiralty powers of the general government, which includes the control of national waterways and of national vessels. Federal jurisdiction over these subjects is, therefore, far more extensive than its jurisdiction over carriers and transportation by land.

All maritime causes, without exception as to subject or parties, are within Federal control, and this whole jurisdiction has been by the judiciary act of 1789 vested in the United States District Courts, "saving to suitors in all cases the right of common law remedy when the common law is competent to give it."¹

Within this very extensive jurisdiction fall all marine contracts and torts,—contracts to be performed upon the high seas or public navigable waters of the United States, and wrongs done upon those seas and waters. In all these cases the test of Federal jurisdiction is that of locality.²

Definition of Public Navigable Waters.—The question, what constitutes a public navigable water of the United States, is one of fact. If a body of water forms by itself, or by its connection with other waters, a continuous highway over which commerce may be carried on in the customary modes by which such commerce is conducted by water, with other States or foreign countries, it is a public navigable water of the United States,³ and for the regulation and protection of such commerce is subject to the public ease-

¹ U. S. Rev. St., sec. 563.

² Ex parte Easton, 95 U. S. 68; The Belfast, 7 Wall. 624, 643; Jervay v. The Carolina, 66 Fed. Rep. 1013; United States v. Burlington, etc. Ferry Co., 21 Fed. Rep. 381; United States v. Beacham, 29 Fed. Rep. 284.

³ The Montello, 11 Wall. 411, 20 id. 430; Escanaba Co. v. Chicago, 107 U. S. 678, 682; The Daniel Ball, 10 Wall. 557; Chisolm v. Caines, 67 Fed. Rep. 285; Little Rock & M. R. Co. v. Brooks, 39 Ark. 403; Gilman v. Philadelphia, 3 Wall. 713, 724; Albany Bridge Case, 2 Wall. 403.

ment and Federal control as far as navigability extends.¹ If it does not form such a highway it is subject only to State control.² The banks of the stream or body of water, and the soil beneath the water within the territorial limits of the State, are subject to its exclusive jurisdiction, so far as is consistent with the paramount authority of Congress. The State may therefore regulate the mode of enjoyment of such public rights as result from ownership of the soil or from its ordinary jurisdiction.³ The control of the highway belongs, however, not to the State, but to the Federal government; for this purpose it is "the public property of the nation and subject to all the requisite legislation of Congress."⁴

The distinguishing test between those streams which are private property and those which are subject to public use and enjoyment is in the determination whether they are susceptible of use as a common passage for the public in passing from State to State.

Streams Not Accessible from Other States.—The Federal power over navigable waters does not include the control of navigation conducted upon the internal waters of a State not accessible from other States,⁵ even when the trade is conducted with Indian tribes.⁶

Artificial Highways.—If a stream be in fact accessible from other States, it is immaterial that in its natural con-

¹Neaderhouser v. State, 28 Ind. 257; United States v. Rio Grande Dam, etc. Co. (N. M.), 51 Pac. Rep. 674.

²The Montello, 11 Wall. 411, 20 id. 430; Commonwealth v. King, 150 Mass. 221; Moor v. Veazie, 33 Me. 343; Veazie v. Moor, 14 How. 568; St. Anthony Falls, etc. Co. v. St. Paul, 168 U. S. 349; United States v. Rio Grande Dam, etc. Co. (N. M.), 51 Pac. Rep. 674.

³See post, pp. 135, 151; State v. Har-

rub, 95 Ala. 176; Smith v. Maryland, 18 How. 71; McCready v. Virginia, 94 U. S. 891; Corfield v. Coryell, 4 Wash. C. C. R. 871; St. Anthony Falls, etc. Co. v. St. Paul, 168 U. S. 349.

⁴Gilman v. Philadelphia, 3 Wall. 713, 725.

⁵Commonwealth v. King, 150 Mass. 221; The Montello, 11 Wall. 411.

⁶Moor v. Veazie, 33 Me. 343; Veazie v. Moor, 14 How. 568.

dition it was not an interstate highway,¹ nor that it may be entirely of artificial construction.² The rule that those waters are only to be considered public waters of the United States which in their natural condition constituted a highway of interstate transportation "cannot be adopted, for it would exclude many of the great rivers of the country, which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation."³

Navigability Not Determined by Means of Transportation.—Nor does the navigability of a stream depend upon the means by which commerce upon it may be conducted, whether by steamers, sailing vessels or rafts, nor upon the difficulties attending navigation. Capability of use by the public affords the true criterion of the navigability of a river rather than the extent and manner of use.⁴

Navigation by vessels is but a branch of commerce, and, when navigable streams are best fitted for other means of water transportation, it is the interest of the public to preserve them for the purposes to which they are best adapted.⁵

At the same time, commerce upon a stream may be so limited as properly to be ignored. It is not every ditch in which the tide ebbs and flows through the extensive salt marshes along the coast which can be considered a navigable stream;⁶ or, as was said in *The Montello*, "it is not every

¹ *The Montello*, 20 Wall. 430.

² *Ex parte Boyer*, 109 U. S. 629.

³ *The Montello*, 20 Wall. 430, 439, 443.

⁴ *Carter v. Thurston*, 58 N. H. 104; *The Montello*, 20 Wall. 430, 441. See Inland Navigation Act of June 7, 1897, Stat. 55th Cong., 1st Sess., p. 96; *State v. White Oak River Corporation*, 111 N. C. 661.

⁵ *Heerman v. Beef Slough Mfg.*

Co., 8 Biss. 334; *Moore v. Sanborn*,

2 Mich. 519; *Pound v. Turck*, 95

U. S. 459; *Brown v. Chadborne*, 31

Me. 9; *United States v. Rio Grande*

Dam, etc. Co. (N. M.), 51 Pac. Rep.

674; *Boykin v. Shaffer*, 13 La. Ann.

129; *Towns of Wethersfield and*

Glastonbury v. Humphrey, 20 Conn.

218.

⁶ *Groton v. Hurlburt*, 22 Conn.

177.

small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable," but in order to give it the character of a navigable stream "it must be generally and commonly useful to some purpose of trade or agriculture."¹

Extent of Admiralty Jurisdiction.—All vessels navigating public waters of the United States are subject to the admiralty jurisdiction of the Federal government, whether engaged in foreign or interstate commerce or not. Rules of navigation, to be effectual for the protection of any vessels, must control all vessels which navigate the same water.²

Regulation of Vessels.—In the exercise of this jurisdiction Congress has assumed control over all ships or vessels of the United States.³ It is said that they are creations of the legislation of Congress.⁴ Much of their value is in their national character and in the protection of the national flag. Congress having secured the value of this species of property may protect the rights of all persons dealing therein,⁵ may control vessels and crews on the high seas and in foreign ports,⁶ and punish wilful injury thereto⁷ or trespass thereon.⁸

¹ The Montello, 20 Wall. 480, 489; 11 Wall. 411, 415.

² Oyster Police Steamers of Maryland, 81 Fed. Rep. 763.

³ U. S. Rev. Stat., tit. L., Regulation of Vessels in Domestic Commerce, sec. 4811 et seq.; Act of April 17, 1874, 18 Stat. L. 80, Supp. R. S. 8; Act of April 18, 1874, 18 Stat. L. 81, Supp. R. S. 8; Act of March 3, 1897, 29 Stat. L. 687; Act of Jan. 18, 1897, 29 Stat. L. 489; Act of June 7, 1897, Statutes of 1st Session 55th Cong. 96; Act of June 26, 1884, 28 Stat. L. 53, Supp. R. S. 440.

⁴ White's Bank v. Smith, 7 Wall. 646, 655.

⁵ The Thomas Swan, 6 Ben. 42. Conf. The Gretna Green, 20 Fed. Rep. 901; Barnaby v. State, 21 Ind. 450.

⁶ Scott v. Sanford, 19 How. 614.

⁷ United States v. Cole, 5 McLean, 518; United States v. Combs, 12 Pet. 72; Ex parte Pool, 2 Va. Cases, 276; Robertson v. Baldwin, 165 U. S. 275; State Tonnage Tax Cases, 12 Wall. 204.

⁸ United States v. Anderson, 10 Blatchf. 226.

Instruments Affecting Title to Vessels.—Congress has also provided for the registry, enrollment and licensing of vessels,¹ and the recording of instruments affecting their title.² These regulations apply to all vessels of the classes described in the acts navigating public waters of the United States,³ although employed solely within a State.⁴ Under the early decisions it was held that a State might, notwithstanding the act of Congress, require conveyances to be recorded with a State officer in order to give constructive notice to third parties;⁵ but later decisions have established that if a conveyance affecting the title to a vessel is recorded as required by the act of Congress, no further conditions of notice can be required by a State,⁶ either by recording or change of possession,⁷ and that recording under a State law does not give constructive notice.⁸

Rule of the Road.—The control of navigable waters as a public highway includes power to make the highway safe. The rule of the road and other regulations established by Congress are obligatory upon owners and masters of all ves-

¹ United States v. Craig, 28 Fed. Rep. 795; State Tonnage Tax Cases, 12 Wall. 204. See statutes cited in note 8, p. 101, *supra*.

² White's Bank v. Smith, 7 Wall. 646; Blanchard v. Brig Martha Washington, 1 Cliff. 468; United States v. Craig, 28 Fed. Rep. 795; Foster v. Chamberlain, 41 Ala. 158; Wood v. Stockwell, 55 Me. 76; Shaw v. McCandless, 36 Miss. 296; Lawrence v. Hodges, 92 N. C. 672; Best v. Staples, 61 N. Y. 71.

³ State Tonnage Tax Cases, 12 Wall. 204, 215; Lawrence v. Hodges, 92 N. C. 672; Best v. Staples, 61 N. Y. 71.

⁴ Foster v. Davenport, 22 How. 244; Lawrence v. Hodges, 92 N. C. 672.

⁵ Thompson v. Van Vechten, 5 Abb. Pr. 458; Commissioners of Pilotage of Mobile v. S. S. Cuba, 28 Ala. 185; Parker Mills v. Jacot, 8 Bos. 61; Aetna Ins. Co. v. Aldrich, 26 N. Y. 92.

⁶ White's Bank v. Smith, 7 Wall. 646; Sinott v. Davenport, 22 How. 237; Blanchard v. Brig Martha Washington, 1 Cliff. 468; Wood v. Stockwell, 55 Me. 76; Haug v. Third National Bank, 77 Mich. 474; Robinson v. Rice, 8 Mich. 235; Shaw v. McCandless, 36 Mich. 296.

⁷ Aldrich v. Aetna Co., 8 Wall. 491; Folger v. Weber, 16 Hun, 512; Mitchell v. Steelman, 8 Cal. 363.

⁸ Perkins v. Emerson, 59 Ma. 319.

sels navigating public waters, whether they are or are not engaged in interstate or foreign commerce.¹

Local Regulations of Navigation.—It was at one time the rule that navigation upon public waters of the United States was subject to State regulation if the transportation was between ports in the same State, and upon this theory State regulation of signal lights and the rule of the road was sustained as applied to vessels upon domestic voyages.² This rule is now abandoned, but it is still held that there are some regulations of navigation of a purely local character which are within the power of the States.³ Such was the ordinance of New York, involved in *The W. H. Beaman*,⁴ that vessels navigating a certain channel should do so as nearly as possible in the center thereof. Regulations of speed near wharves,⁵ requiring the use of spark-arresters on steamers navigating near buildings,⁶ and prohibiting the emission of dense smoke within the limits of a city,⁷ have all been sustained.

Inspection of Vessels, Licensing Officers, etc.—The early decisions held that the Federal statutes requiring inspection of hulls and boilers of steam vessels and licensing of engineers and officers did not apply to domestic transportation,⁸ or to the case of a tug used within a State towing vessels

¹ *Waring v. Clark*, 5 How. 441. *Conf. The Bright Star*, 1 Wool. 288.

² *Fitch v. Livingston*, 4 Sandf. 492; *Snow v. Hill*, 20 How. 543, 551; *Steamboat New York v. Rea*, 18 How. 223. *Conf. Halderman v. Beckwith*, 4 MoLean, 286.

³ *Conf. Harrigan v. Lumber Co.*, 129 Mass. 580.

⁴ 45 Fed. Rep. 125.

⁵ *People v. Jenkins*, 1 Hill (N. Y.), 468; *People v. Roe*, 1 Hill, 470.

⁶ *Burrows v. Delta Transportation Co.*, 106 Mich. 582; *Cheboygan*

Lumber Co. v. Delta Transportation Co., 100 Mich. 16.

⁷ *Harmon v. City of Chicago*, 110 Ill. 400.

⁸ *United States v. The James Morrison*, Newb. 241; *The Bright Star*, 1 Wool. 286; *The Thomas Swan*, 6 Ben. 42; *The William Pope*, Newb. 256; *The Tug Oconto*, 5 Biss. 460; *United States v. The Seneca*, 1 Am. L. Reg. (N. S.) 281; *Barnaby v. The State*, 21 Ind. 450; *Navigation Co. v. Dwyer*, 29 Tex. 376.

engaged in interstate transportation,¹ and the same view was taken of the Federal statute concerning life-preservers, buckets, etc.² It is now established, however, that all vessels navigating public national waters are subject to Federal inspection,³ and this applies to a vessel owned by a State and used in enforcing its fishery laws and relieving distressed vessels.⁴ State laws requiring inspection of vessels operating between ports within the State are therefore superseded by the Federal statute.⁵

In *Hartranft v. Du Pont*⁶ the Federal statute relating to inspection of steam vessels was applied to a small launch used wholly within the State of Delaware, taking the owner, and occasionally some of his employees, to and from their place of work. Inspection of boilers and hulls, the court said, is required not alone for the safety of the boat, its passengers and crew, but also for the protection of other boats navigating the same waters or moored at the same docks.

Provisions Relating to Passengers.—It is held also that the Federal statutes limiting the number of passengers which a vessel may carry apply to vessels upon public navigable waters, although engaged in transportation between ports in the same State.⁷

So where the master of a vessel engaged in domestic transportation, by inattention to his duties, permitted a rail on the

¹ The *Farragut*, 6 Blatchf. 207.

² The *Gretna Green*, 20 Fed. Rep. 901; The *Thomas Swan*, 6 Ben. 42.

³ Rev. Stat. 4399 et seq.; The *Montello*, 20 Wall. 490; The *Daniel Ball*, 10 Wall. 557; *Bradley v. Northern Transportation Co.*, 15 Ohio St. 558; *United States v. Steamboat Sunswick*, 6 Ben. 112, 15 Int. Rev. Rec. 154. See *Poree v. Cannon*, 14 La. Ann. 506.

⁴ The *Governor Robert McLean v. United States*, 85 Fed. Rep. 926;

Oyster Police Steamers of Maryland, 81 Fed. Rep. 703.

⁵ *Caldwell v. Insurance Co.*, 1 La. Ann. 85.

⁶ 118 U. S. 223.

⁷ The *City of Salem*, 38 Fed. Rep. 762; The *City of Salem*, 37 Fed. Rep. 846; *United States v. Frank Sylvia*, 37 Fed. Rep. 155; *United States v. Burlington & Henderson County Ferry Co.*, 21 Fed. Rep. 831; The *Hazel Kirk*, The *Rosa*, 23 Blatch. 292; s. c., 25 Fed. Rep. 601.

deck of a boat to be without a guard, an indictment was sustained for violation of the Federal statutes.¹

In all such cases the Federal jurisdiction is derived not only from the commerce clause, but from the admiralty power to define torts or crimes in the navigation of vessels upon public waters of the country. Violations of laws passed under this authority fall within the admiralty jurisdiction.²

Limitation of Liability.—Congress may limit the liability of vessels or their owners incurred in the performance of maritime contracts,³ and for marine torts. Where the injury is consummated on land, not on water, the subject is without the Federal jurisdiction.⁴ It was for some time considered that the Federal statute in regard to limitation of liability applied only to vessels engaged in foreign commerce and commerce among the States.⁵ This limitation is now abandoned. In *Lord v. Steamship Co.*⁶ the Federal statute limiting liability was applied in the case of a vessel navigating the Pacific ocean between ports in the State of California. The ocean, the court said, belongs to no one nation, but is the common property of all. When, therefore, the vessel left the ports of California on her different voyages, she entered upon a navigation which was necessarily connected with other nations. "While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of

¹United States v. Beacham, 29 Fed. Rep. 284.

²United States v. Burlington & Henderson County Ferry Co., 21 Fed. Rep. 831, 839; Janney v. Columbian Insurance Co., 10 Wheat. 411.

³U. S. Rev. Stat., secs. 4283, 4289; Supp. R. S. 443.

⁴Johnson v. Chicago, etc. Elevator Co., 119 U. S. 888; King v.

American Transportation Co., 1 Flip. C. C. Rep. 1.

⁵Moore v. American Transportation Co., 24 How. 1; American Transportation Co. v. Moore, 5 Mich. 868.

⁶102 U. S. 541. See Houston Direct Navigation Co. v. Insurance Co. of North America, 89 Tex. 1, reversing (Tex. Civ. App.) 81 S. W. Rep. 560, 685.

commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce." All such navigation affects the nation in its external affairs and falls within Federal control. In the case cited, the jurisdiction was based upon the Federal power to regulate foreign commerce. Other decisions have clearly established that the law limiting the liability of ship owners is a part of the maritime code of the general government co-extensive with the general admiralty and maritime jurisdiction, and not limited by the restrictions upon the commercial power. It extends, therefore, wherever public navigation extends.¹

¹In re Garnett, 141 U. S. 1; *Butler v. Boston Steamboat Co.*, 130 U. S. 527; *Providence & New York Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578, 593; *The Scotland*, 105 U. S. 24, 29, 81; *Norwich Co. v. Wright*, 18 Wall. 104, 127; In re *Myers Excursion Co.*, 57 Fed. Rep. 240; *The Katie*, 40 Fed. Rep. 490; In re *Petition of East River Ferry Co.*, 26 Fed. Rep. 766; In re *Goodrich Transportation Co.*, 26 Fed. Rep. 718. *Contra*, In re *Petition of Vessel-Owners' Towing Co.*, 26 Fed. Rep. 169.

CHAPTER IV.

CONTROL OF NAVIGABLE WATERS.

The extension of Federal power to authorize improvements, alterations and obstructions in navigable waters involves the history of the long struggle over internal improvements, and presents one of the most marked instances of the growth of Federal jurisdiction.

Such a power, President Monroe said,¹ must, if it exists, find its source by implication from one or more of six provisions of the Constitution. It must be derived either, first, from the power to establish post offices and post roads; second, from the power to declare war; third, from the power to regulate commerce; fourth, from the power to pay the debts and provide for the common defense and welfare of the United States; fifth, from the power to make all laws necessary and proper for carrying into execution the constitutional powers of the Federal government; or sixth, from the power to make needful rules and regulations respecting the territory and other property of the United States.

The power to establish post roads, President Monroe says, must be understood in the Constitution in the sense which it had in the Confederation; and its history, as exercised by the States and the Confederation, shows that it was nothing more than a power to fix the places where post offices should be established. In no instance, from the first settlement of the country to the adoption of the Constitution, was a post office established without a view to existing roads, or was a single road made to accommodate a post office. It is apparent, therefore, President Monroe argues, that it was

¹ Views of President Monroe upon Internal Improvements, inclosed in Message to Congress, May 4, 1822.

not intended by this clause to give to the United States jurisdiction over all the highways and turnpikes of the country.

Of the power to regulate commerce President Monroe disposes very briefly. It involves little more, he says, than the right to levy an impost on goods brought from foreign nations and the power to prevent an impost on trade between the States.

Of the other powers named,—the war power, the power to make appropriations, to regulate the property of the general government and to make all necessary laws to carry the constitutional powers into execution,—none involved the exercise of civil jurisdiction within a State, and without such jurisdiction there would be no authority to make internal improvements.

In this view it was long customary for all improvements of harbors and navigable waters to be made by the States alone, Congress granting the right to lay duties at their ports to raise necessary revenue. The purpose of the provision in the Constitution that no tax or duty shall be laid by any State upon exports or imports, without the consent of Congress, was to provide for "such improvement in harbors and other cases, having, like their inspection laws, relation to their maritime commerce, as particular States might have a local interest in making apart from, or in addition to, federal provision. That this was understood to be the meaning of the clause, is demonstrated by the early, continued, and only use made of the power granted by Congress. It appears from the laws of the United States, that beginning with the year 1790, and previous to the year 1815, the consent of Congress, on applications from Massachusetts, Rhode Island, Pennsylvania, Maryland, Virginia, South Carolina, and Georgia, was in pursuance of the tenth section, article one of the Constitution, granted or renewed in not less than twenty instances for State duties, to defray the expense of cleaning out harbors or rivers, erecting piers or light-houses, or appointing health officers."¹

¹ Letter of Madison to Professor Davis, 1882. The following instances are cited in a note: Acts of Congress of August 11, 1790; Jan-

The power to authorize erection of bridges and dams was another power which it was said necessarily belonged to the States. "Any power which congress may have in regard to such a structure is indirect, and results from a commercial regulation. It may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power of Congress can be exercised." . . . "If, under the commercial power congress may make bridges over navigable waters, it would be difficult to find any limitation of such a power." . . . "So extravagant and absorbing a federal power as this rarely, if ever, has been claimed by any one."¹

If the Constitution were construed alone by the intention of its framers, the conclusion that the Federal government is without power to authorize improvements in navigable waters within the territorial limits of a State would probably be sustained, but the judgment of history has been otherwise. In the development of the government it has been found that possession of this authority is necessary for the safety of the United States and to enable it to carry into effect its other powers.

Federal Authority Over Navigable Waters.—It is now well settled that the Federal authority over navigable waters includes not only the power to improve their navigation² and to regulate their use as a highway,³ but it includes also authority to do everything necessary to make and keep the highway open and safe. A State may not restrict the right

uary 10, 1791; March 19, 1792; February 9, 1791; June 9, 1794; March 2, 1795; May 12, 1796; March 27, 1798; March 17, 1800; February 27, 1801; April 14, 1802; March 16, 1804; March 1, 1805; February 28, 1806; March 28, 1806; April 20, 1808; June 15, 1809; March 2, 1811; March 2, 1818; April 16, 1814.

¹ *People v. Rensselaer, etc. Ry. Co.*, 15 Wend. 118; *Wheeling Bridge Case*, opinion of Mr. Justice McLean, 18 How. 442.

² *Wisconsin v. Duluth*, 96 U. S. 879.

³ *Works v. Junction Ry. Co.*, 5 McLean, 425; *Hoelt v. Seaman*, 46 How. Pr. 24.

of navigating public water,¹ nor may it impose any burden or tax thereon. The Federal government may declare what constitute obstructions in navigable waters,² and may require their removal;³ may make it unlawful, without permission of the Secretary of War, to alter the channel of a navigable river,⁴ or to place any obstruction therein;⁵ may authorize erection of piers, dikes, etc.;⁶ may close⁷ or change⁸ outlets of lakes or rivers; may authorize the condemnation of private property,⁹ and the collection of tolls for the use of the improved channel.¹⁰ It may provide for the construction and maintenance of light-houses and for the survey of coasts, rivers and harbors;¹¹ and may authorize the taking for interstate commerce of soil under a navigable stream without compensation to the State.¹²

¹ *Gibbons v. Ogden*, 9 Wheat. 1; *North River Steamboat Co. v. Livingston*, 8 Cow. 713. See *Gibbons v. Livingston*, 6 N. J. L. 236, overruling earlier cases, *Livingston v. Ogden*, 4 Johns. Ch. 48; *Ogden v. Gibbons*, 4 Johns. Ch. 150, 174; *In re Vanderbilt*, 4 Johns. Ch. 57; *North River Steamboat Co. v. Hoffman*, 5 Johns. Ch. 300; *Livingston v. Van Ingen*, 9 Johns. 507; *Ogden v. Gibbons*, 17 Johns. 496.

² *Cardwell v. Bridge Co.*, 113 U. S. 205; *Miller v. Mayor of New York*, 109 U. S. 385; *Escanaba Co. v. Chicago*, 107 U. S. 678; *South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 713; *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421; *United States v. North Bloomfield Gravel Mining Co.*, 81 Fed. Rep. 248.

³ *Removal of Obstruction to Navigation*, 15 Op. Atty. Gen. 284; *Coonley v. Albany*, 132 N. Y. 145.

⁴ *City of Chicago v. Law*, 144 Ill. 569.

⁵ *United States v. Burns*, 54 Fed. Rep. 351.

⁶ *Soil Under Navigable Waters*, 16 Op. Atty. Gen. 479; *Improvement of Navigable Waters*, 17 Op. Atty. Gen. 109; *Covington Harbor Co. v. Bridge Co.*, 23 Weekly Law Bulletin, 34; *Mills v. United States*, 46 Fed. Rep. 788; *Gibson v. United States*, 166 U. S. 269; *Improvement of Navigable Waters*, 18 Op. Atty. Gen. 64; *Improvement of Navigable Waters*, 16 Op. Atty. Gen. 534.

⁷ *South Carolina v. Georgia*, 93 U. S. 4.

⁸ *Avery v. Fox*, 1 Abb. 246; *United States v. Boom Co.*, 1 McCrary, 397.

⁹ *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. Rep. 524; *Monongahela Navigation Co. v. United States*, 148 U. S. 812.

¹⁰ *United States v. Louisville & Portland Canal Co.*, 1 Flip. 260.

¹¹ *United States v. Rhodes*, 1 Abb. 49.

¹² *Stockton v. Baltimore, etc. Ry. Co.*, 32 Fed. Rep. 2.

It is also established by a long course of decisions that Congress may authorize the construction of bridges¹ and dams² in navigable waters; it may authorize a private corporation to construct a bridge over navigable waters partly within a State, notwithstanding the protest of the State,³ and where necessary for this purpose may authorize the condemnation of land and appropriation of soil under water for support of piers;⁴ it may determine what municipal law shall prevail upon the bridge;⁵ the compensation which shall be charged for its use,⁶ and may give to Federal courts jurisdiction over litigation arising out of the construction, use or operation of the bridge, or instituted for the condemnation of land.⁷

The earlier doctrine seems to have been that any obstruction to navigation, whether by a State or individuals, was an act of purpresture and open to remedy by the Attorney-General of the United States;⁸ but it is more recently held that

¹ *Luxton v. North River Bridge Co.*, 158 U. S. 526; *Miller v. Mayor of New York*, 109 U. S. 885; *Bridge Co. v. United States*, 105 U. S. 470; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Clinton Bridge Case*, 10 Wall. 454; *Clinton Bridge Case*, Woolw. 150; *United States v. Milwaukee & St. P. R. Co.*, 5 Biss. 420; *Miller v. Mayor of New York*, 13 Blatch. 469; *Baird v. Shore Line R. Co.*, 6 Blatch. 461; *Texarkana & Ft. Scott Ry. Co. v. Parsons*, 74 Fed. Rep. 408; *United States v. Rider*, 50 Fed. Rep. 406; *State v. Boller*, 47 Fed. Rep. 415; *St. Louis & St. P. Packet Co. v. Keokuk Bridge Co.*, 31 Fed. Rep. 755; *Decker v. Baltimore & N. Y. Ry. Co.*, 30 Fed. Rep. 728; *United States v. Pittsburg & L. E. R. Co.*, 26 Fed. Rep. 113; *Mississippi River Bridge Co. v. Longeran*, 91 Ill. 508; *Chicago & A. B. Co. v. Pacific Tel. Co.*, 86 Kan. 113; *People v. Kelly*, 5 Abb. N. C. (N. Y.) 388; *Winifrede Coal Co. v. Central R. & B. Co.* (Ct. Com. Pl.), 24 W. L. B. 178; *Covington Harbor Co. v. Phoenix Bridge Co.* (Sup. Ct., Cincinnati), 28 W. L. B. 84.

² *Improvement of Navigable Waters*, 17 Op. Atty. Gen. 109; *Mills v. United States*, 46 Fed. Rep. 788.

³ *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 87 Fed. Rep. 129.

⁴ *Stockton v. B. & N. Y. R. Co.*, 32 Fed. Rep. 9; *Decker v. Baltimore & N. Y. R. Co.*, 30 Fed. Rep. 723.

⁵ *Commissioners of Parks v. Common Council of Detroit*, 80 Mich. 663.

⁶ *Canada So. Co. v. International Bridge Co.*, 8 Fed. Rep. 190.

⁷ *Lincks v. Amend* (N. J. Ch.), 32 Atl. Rep. 755.

⁸ *Waukegan Breakwater*, 6 Op. Atty. Gen. 172.

in the absence of legislation by Congress the regulation of a navigable stream belongs to the States,¹ and the government cannot by bill or information prevent or abate an obstruction.² Where Congress has assumed jurisdiction over a stream, the United States may maintain an injunction bill to prevent interference with navigation upon it,³ and to protect improvements made under its authority from injuries which may be caused by other improvements under State authority, or to prevent obstructions.⁴

By Federal legislation⁵ every obstruction in navigable waters is forbidden unless affirmatively authorized by law, and it is provided that creating and continuing any unlawful obstruction may be prevented, and obstructions may be removed, under the injunction of any Circuit Court exercising jurisdiction in the district where the obstruction exists or is threatened, in proceedings in equity instituted by the direction of the Attorney-General of the United States.

An unlawful obstruction in public navigable waters which threatens irreparable injury to an individual may be the subject of relief in equity,⁶ and, when constructed, may be a public nuisance which any interested person may abate.⁷

¹ *Navigation Co. v. Railroad Co.*, 88 Ky. 1.

² *United States v. Beef Slough, etc. Co.*, 8 Biss. 421; *United States v. North Bloomfield Gravel Mining Co.*, 81 Fed. Rep. 2; *Texas & P. R. Co. v. New Orleans*, 40 Fed. Rep. 111; *United States v. Railway Bridge Co.*, 6 McLean, 517; *Obstruction to Navigation*, 15 Op. Atty. Gen. 515; *State v. White Oak River Corporation*, 111 N. C. 661.

³ *United States v. Milwaukee & St. P. R. Co.*, 5 Biss. 420; *United States v. North Bloomfield Gravel Mining Co.*, 81 Fed. Rep. 243; *Harbor Improvement at Chicago*, 17 Op. Atty. Gen. 279.

⁴ *United States v. Duluth*, 1 Dill. 469; *Harbor Improvement at Chicago*, 17 Op. Atty. Gen. 279; *United States v. Boom Co.*, 1 McCrary, 397.

⁵ See *post*, p. 126.

⁶ *Texas & P. Ry. Co. v. Interstate Transportation Co.*, 155 U. S. 585; *Works v. Junction Ry. Co.*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, *id.* 517; *Northern Pacific Ry. Co. v. Barnsville & M. R. Co.*, 2 McCrary, 224; *Devoe v. Penrose Ferry Co.*, 5 Pa. Law Jour. Rep. 313.

⁷ *State v. Dibble*, 4 Jones, L. (N. C.) 107; *Renwick v. Morris*, 3 Hill, 621.

Powers of the States to Improve Navigable Waters.—It has always been the rule that, in the absence of Federal legislation, the States may prevent obstruction of navigable waters within their limits;¹ may regulate the placing of buoys and beacons;² the construction of wharves;³ and may deepen channels,⁴ change outlets of lakes and rivers,⁵ construct dams⁶ and locks to increase the depth of water or for other purposes, care being taken not to create serious impediment to the navigation of important waters; may construct canals around falls, and improve their harbors and rivers generally, and may collect a charge from vessels⁷ using the improved navigation, as a compensation for the facilities thus afforded.⁸

¹ *Coonley v. Albany*, 132 N. Y. 145; *Cox v. State*, 3 Blackf. 193; *Illinois v. St. Louis*, 5 Gilm. 351.

² *Mobile v. Kimball*, 102 U. S. 691; *Stockton v. Powell*, 29 Fla. 1.

³ *State v. Sargent*, 45 Conn. 358; *City of Savannah v. State*, 4 Ga. 26; *Sullivan v. Moreno*, 19 Fla. 200; *Eldridge v. Cowell*, 4 Cal. 80; *United State v. Bain*, 3 Hughes, 593; *State v. Illinois Central Ry.*, 33 Fed. Rep. 730, 146 U. S. 387.

⁴ *Mobile v. Kimball*, 102 U. S. 691; *Morris v. State*, 62 Tex. 728.

⁵ *Commissioners of Homochitto v. Withers*, 29 Miss. 21; *Withers v. Buckley*, 20 How. 84; *Illinois v. St. Louis*, 5 Gilm. 351.

⁶ *Pound v. Turck*, 95 U. S. 459; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Heerman v. Beef Slough, etc. Co.*, 8 Biss. 334; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. 158; *Depew v. Canal Trustees*, 5 Ind. 8; *Egan v. Hart*, 45 La. Ann. 1353; *Butler v. State*, 6 Ind. 165; *Hogg v. Zanesville Co.*, 5 Ohio, 410; *Flanagan v. Philadelphia*, 42 Pa. St.

219; *Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62; *Stoughton v. State*, 5 Wis. 291; *Glover v. Powell*, 10 N. J. Eq. 211; *Brown v. Commonwealth*, 3 S. & R. 273; *Bacon v. Arthur*, 4 Watts, 487. *Contra*, *Cox v. State*, 3 Blackford, 193.

⁷ *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Mobile v. Kimball*, 102 U. S. 691; *Stockton v. Powell*, 29 Fla. 1; *Depew v. Canal Trustees*, 5 Ind. 8; *Coonley v. Albany*, 132 N. Y. 145; *Railroad Co. v. Lawrence*, 2 Hun, 163; *Sinnickson v. Johnson*, 2 Harr. 129.

⁸ *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; *Huse v. Glover*, 119 U. S. 543; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-214; *Mobile v. Kimball*, 102 U. S. 691; *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; *Boykin v. Shaffer*, 18 La. Ann. 129; *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; *McReynolds v. Smallhouse*, 3

The fact that a vessel has procured a coasting license under the Federal laws gives no exemption from such regulation. "A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privileges to use free of tolls, or of any condition whatsoever, the canals constructed by a State, or the water-courses partaking of the character of canals exclusively within the interior of a State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end."¹

Obstructions in Navigable Waters.—It has been urged that the fact that navigable waters of the United States are common highways of the nation deprives the States of the right to authorize any material obstruction in them. The existence of a highway imports the right of free passage, and whatever interferes with the exercise of this right, it was said, is a nuisance. In the *Wheeling Bridge* case² the court, notwithstanding the declaration of the legislature of Virginia that the bridge did not constitute a material impediment to navigation, referred the determination of this question to a master. The conclusion was therefore drawn that where an erection in navigable waters was made in aid of commerce, the question determining its legality was one of fact, whether the impediment proposed was a material obstruction to important navigation. If it were material, it could not be authorized by a State, even in streams wholly

Bush, 447; *Palmer v. Cuyahoga Co.*, 8 McLean, 226; *Morris v. State*, 62 Tex. 728; *Benjamin v. Manistee, etc. Co.*, 42 Mich. 628; *Nelson v. Cheboygan Navigation Co.*, 44 Mich. 7; *Commissioners v. Green*, 79 Ky. 78; *Wisconsin River Imp. Co. v. Manson*, 48 Wis. 255; *Harmon v. City of Chicago*, 140 Ill. 874; *Board of Commissioners v. Willamette Trans. Co.*, 6 Oreg. 219. Conf. *Harmon v. Chicago*, 147 U. S. 396.
¹ *Veazie v. Moor*, 14 How. 568; *Packet Co. v. Keokuk*, 95 U. S. 80; *Keokuk v. Packet Co.*, 45 Iowa, 106.
² 13 How. 621. See *Cass County v. Chicago, etc. R. Co.*, 25 Neb. 348, 354.

within its limits; but if the obstruction were not serious, or if the navigation impeded were not important, the decision of the State, in the absence of Federal legislation, was controlling.¹ It appears to have been generally considered, even at this time, as indispensable to the States that they should be able to make such improvements as local necessities required, and in so doing to obstruct waters theretofore navigable. In the first case which presented this question to the Supreme Court, it was held that the State of Delaware might authorize the erection of a dam completely closing a small stream to navigation,² and many other cases are to be found in which the States have been sustained in authorizing obstructions to navigable waters.³

The rights of commerce by vessels are not paramount to rights of commerce conducted by any other method, or to other rights which are protected by law. Some concession must be made on every side for convenient pursuit of different occupations, and in this matter regulations can often best be made by the local authority rather than by a government at a distance.⁴

¹ *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 395; *Coleman v. Bridge Co.*, id. 395; *Mississippi, etc. R. R. Co. v. Ward*, 2 Black, 436, 494, 495; *Scott v. City of Chicago*, 1 Biss. 510; *Columbus Ins. Co. v. Peoria Bridge Ass'n*, 6 McLean, 70; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 227; *Delaware & Hudson C. Co. v. Lawrence*, 2 Hun, 163; *Chicago v. McGinn*, 51 Ill. 266; *Williams v. Beardsley*, 2 Ind. 591; *State v. Leighton*, 83 Me. 419; *Baltimore v. Stroll*, 52 Md. 435; *Commissioners v. Board of Public Works*, 39 Ohio St. 628. See *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. 300; *Albany Bridge Case*, 3 Wall. 403.

² *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

³ *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Pound v. Turck*, 95 U. S. 459; *Gilman v. Philadelphia*, 3 Wall. 713; *United States v. Bellingham Bay Boom Co.*, 72 Fed. Rep. 585; *Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158; *Egan v. Hart*, 45 La. Ann. 1858; *Morgan v. King*, 18 Barb. 277; *People v. City of St. Louis*, 10 Ill. 351; *Neadrhouser v. State*, 28 Ind. 257; *Butler v. State*, 6 Ind. 165; *Depew v. Canal Trustees*, 5 Ind. 8; *Rutz v. City of St. Louis*, 10 Fed. Rep. 338.

⁴ *Hamilton v. V. S. & P. R. Co.*, 119 U. S. 280; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Miller v. Mayor of New York*, 109 U. S. 385; *Escanaba Co. v. Chicago*, 107

The Purpose of the Obstruction.—In most cases the obstructions placed in navigable waters under State authority have been bridges or wharves, which, like the streams themselves, are means of commercial intercourse, and in the language of the courts some suggestion may be found that States cannot authorize obstructions in public waters not intended to facilitate commerce.¹ This has not been adopted by the Supreme Court as a test of the legality of State action.

In *Willson v. Blackbird Creek Marsh Co.*,² the dam was erected to drain a marsh for the purpose of improving the healthfulness of the region.

In some parts of the country where a stream is of small value for navigation, and of great public importance as a source of water-power, a State may devote it to the latter use,³ while in other places a State may destroy the navigability of a stream, that its waters may be used for irrigation. The arid portion of the country, in which the rainfall is not sufficient for the production of crops, covers about four-tenths of the entire area of the United States. "Here the paramount interest is not the navigation of the streams but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, ade-

U. S. 678; *Pound v. Turck*, 95 U. S. 459; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401; *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawy. 127; *Gilman v. Philadelphia*, 8 Wall. 718; *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Columbus Ins. Co. v. Peoria Bridge Ass'n*, 6 McLean, 70; *Williams v. Beardsley et al.*, 2 Ind. 159; *Commissioners v. Pidge*, 5 Ind. 13; *Commonwealth*

v. Breed, 4 Pick. 460; *People v. Rensselaer, etc.* R. R., 15 Wend. 113.

¹Conf. Cooley, *Const. Lim.* (6th ed.), p. 730; *Sullivan v. Moreno*, 19 Fla. 200.

²2 Pet. 245.

³See *St. Anthony Falls Water Power Co. v. Board, etc. of St. Paul*, 168 U. S. 849; *State v. City of Eau Claire*, 40 Wis. 533.

quate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and, if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity."¹

The rule which defines the power of the States over navigable waters does not limit that power to a comparison of the requirements of commerce by land and by water to decide which shall be preferred, and what concessions the one shall make to the other. In this, as in other similar matters, the public need is the controlling consideration, and in the absence of Federal legislation the States may devote their waters to such purposes as they deem best.

The Present Rule.—It is apparent from the foregoing considerations that the question, whether or not an obstruction should be permitted in navigable waters wholly within a State, is essentially legislative, and this, it is now held, in the absence of Federal legislation, is controlled entirely by the States.

There is no common law of the United States prohibiting such obstructions, and, without a Federal statute, obstructions and nuisances in navigable streams within the States are not within the scope of Federal laws as administered by courts of law and equity. These are offenses against the laws of the States in which the navigable waters lie, but they are not offenses against United States laws which do not exist, and none exist except such as are to be found on the statute book.² The States may therefore authorize

¹ *United States v. Rio Grande* Dept., 168; U. S. Rev. Stat., sec. 2339; *Dam, etc. Co. (N. M.)*, 51 Pac. Rep. *Basey & Gallagher*, 20 Wall. 670. 674; 1 Supp. U. S. Rev. Stat., pp. 187, ² *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1.

bridges or other obstructions in their navigable waters,¹ but in all cases the jurisdiction of the State is subject to the controlling authority of Congress to regulate the character and method of their use, or even to require the removal of erections so authorized.²

Obstructions in Interstate Streams.—The dividing line between State and Federal powers over streams which form the boundary between States, or which in their course flow through two or more States, is not well defined;³ but the courts appear to make a difference between such streams and those which are wholly within a State,⁴ and have not infrequently

¹ *Lake Shore, etc. R. Co. v. Ohio*, 165 U. S. 365; *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 224; *The Passaic Bridges*, 3 Wall. 782; *Illinois River Packet Co. v. Peoria Bridge Ass'n*, 88 Ill. 467; *Hamilton v. Vicksburg, etc. Ry. Co.*, 84 La. Ann. 970; *Baltimore v. Stroll*, 52 Md. 435; *Williams v. Beardsley*, 2 Ind. 591; *Commonwealth v. Taunton*, 7 Allen, 309; *Bailey v. P. W. & B. Ry. Co.*, 4 Harr. (Del.) 389; *Lister v. Newark Plank Road Co.*, 9 Stew. 477; *People v. Rensselaer & S. R. Co.*, 15 Wend. 114; *Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339; *Peters v. New Orleans M. & C. R. Co.*, 56 Ala. 528; *Towns of Groton and Ledyard v. Hurlbut*, 23 Conn. 177; *Green, etc. Navigation Co. v. Ches. O. & S. W. R. Co.*, 88 Ky. 1; *County Commissioners of Talbot County v. Queen Anne's County*, 50 Md. 245; *Board of Commissioners v. Pidge*, 5 Ind. 13.

² *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Cardwell v. American Bridge Co.*, 118 U. S. 205; *Escanaba Co. v. Chicago*, 107 U. S. 678, 687; *Oregon Transportation Co.*

v. Columbia Street Bridge Co., 53 Fed. Rep. 549; *Rhea v. Newport N. & M. V. R. Co.*, 50 Fed. Rep. 16; *Cardwell v. American Bridge Co.*, 19 Fed. Rep. 563; *Willamette Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347; *Milnor v. N. J. R. Co.*, 16 Lawy. Co-op. U. S. Rep. 799; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Works v. Junction Ry. Co.*, 5 McLean, 425; *Palmer v. Cuyahoga County*, 8 McLean, 226; *Hatch v. Willamette Iron Bridge Co.*, 7 Sawy. 127, 141; *State v. Leighton*, 88 Me. 419; *State v. Dibble*, 4 Jones, L. (N. C.) 107; *United States v. New Bedford Bridge*, 1 Wood. & Minot, 401; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395.

³ *Albany Bridge Case*, 2 Wall. 403.

⁴ *Willamette Bridge Co. v. Hatch*, 125 U. S. 1; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389, 395; *South Carolina v. Georgia*, 38 U. S. 4, 12. See *United States v. New Bedford Bridge*, 1 Wood. & Minot, 407; *Craig v. Kline*, 65 Pa. St. 399, 410. *Contra*: *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Ormerod v. New York, W. S. & B. R. R. Co.*, 21 Blatch. 106.

emphasized this distinction in sustaining State legislation over their domestic waters.¹

It may have been for want of a Federal common law, among other reasons, that in the celebrated *Wheeling Bridge case*² the Supreme Court, while holding that a State through whose territory the Ohio river flowed could authorize no substantial obstruction to its navigation, based its judgment upon Federal legislation rather than upon the effect of the constitutional provision. Even in the absence of such legislation, however, it seems that there is a material difference between State powers over the two classes of streams. In the case of a river flowing through several States, an obstruction in its lower course, for example, might offer the lower State a very effective means of commercial discrimination; while no such danger would exist in streams which were situate entirely within the limits of a single State. The commerce clause, construed by its purpose to keep commerce among the States free from local impediment, may therefore well forbid obstruction of the great highways which extend from one State to another, leaving domestic highways to the care of the States. A bridge across the Mississippi in Louisiana which would compel transshipment of freight at that point should be as much within the prohibition of the commerce clause as the Iowa statute which attempted to compel the Union Pacific Railway to transship freight at Council Bluffs.³ It is probable, therefore, that serious obstructions in important interstate highways may not be authorized by a State.⁴

¹ *Willamette Bridge Co. v. Hatch*, 125 U. S. 1; *Cardwell v. American Bridge Co.*, 118 U. S. 205; *Escanaba & S. M. Transportation Co. v. Chicago*, 107 U. S. 678; *Hall v. De Cuir*, 95 U. S. 485, 488; *Pound v. Turck*, 95 U. S. 459; *Gilman v. Philadelphia*, 8 Wall. 718; *Stockton v. Powell*, 29 Fla. 1; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 889, 895; *Chicago v. McGinn*, 51 Ill. 266; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet.

251; *United States v. New Bedford Bridge Co.*, 1 Wood. & M. 407; *The Passaic Bridges*, 8 Wall. 783; *Flanagan v. City of Philadelphia*, 49 Pa. St. 219. *Conf. Devoe v. Penrose Ferry Bridge Co.*, 7 Fed. Cas. 566.

² *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 518.

³ *Council Bluffs v. Kansas City Ry. Co.*, 45 Iowa, 348.

⁴ *In re Debs*, 158 U. S. 564.

In view of the large amount of Federal legislation concerning navigable waters, the question what rule would prevail in the absence of such legislation is probably not now of practical importance.

Establishment of Port of Entry.—In the *Wheeling Bridge* case¹ the court noticed the fact that Congress had established a port of entry above the proposed obstruction. Such legislation is not sufficient, however, to indicate the congressional will that navigation upon a stream should be unimpeded. When Congress establishes a port of entry, it does so without reference to the considerations which call for exercise of the State police powers, and, on the other hand, legislation in regard to internal police is made without special reference to the considerations which determine the location of ports of entry. A city would still be a port of entry although inaccessible by water. All railroads, canals, harbors and bridges necessarily affect commerce, but the establishment of a port of entry does not give to Congress control over all means of access to it.²

The Ordinance of 1787.—The ordinance adopted in 1787 for the government of the Northwest Territory contained the well known provision that:

“The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor.”

This Ordinance does not declare the Mississippi river itself a common highway, but, assuming the common right to free navigation of that river as already existing, places all its tributaries upon the same footing.³

The framers of the Ordinance evidently considered that

¹ 18 How. 518, 18 How. 421.

Willamette Bridge Co. v. Hatch, 125

² *The Passaic Bridges*, 8 Wall. 782; U. S. 1.

³ *People v. St. Louis*, 10 Ill. 351.

its provisions would always be of binding obligation, and the Congress of the United States apparently shared in this view. On the 7th of August, 1789, it passed an act recognizing the ordinance.¹

In 1790² the Ordinance was applied, except the sixth article, as the rule for the government of the territory south of the river Ohio, and in 1798³ it was applied to the Mississippi Territory. Some of its provisions were incorporated in acts erecting State governments in the Northwest Territory.⁴ Similar provisions were inserted in acts admitting other States into the Union.⁵ The courts appear to have accepted the validity of this legislation without question.⁶

In *Pollard v. Hagan*,⁷ decided in 1844, the effect of the provision in the act admitting the State of Alabama was considered by the Supreme Court, and it was held that, when that State was admitted into the Union, it succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of its cession to the United States of lands southwest of the Ohio river, except so far as this right was diminished by the temporary possession and control of the public lands by the Federal government. The declaration making the navigable waters within the limit of the State common highways was, therefore, ineffectual as a limitation upon the powers of the State.⁸

¹ 1 U. S. Stat. L. 50.

² 1 Stat. L. 123.

³ 1 Stat. L. 549.

⁴ Indiana: 2 Stat. L. 53; Act of April 19, 1816, 3 Stat. L. 299, sec. 4; Resolution of Dec. 11, 1817, 3 Stat. L. 399. Illinois: 2 Stat. L. 514; Act of April 18, 1818, 3 Stat. L. 428, sec. 4; Resolution of Dec. 3, 1818, 3 Stat. L. 536. Michigan: 2 Stat. L. 309.

⁵ Mississippi: Act of March 1, 1817, 3 Stat. L. 348, sec. 4; Resolution of Dec. 10, 1817, 3 Stat. L. 472. Louisiana: sec. 3, Act of Feb. 20, 1811, 2 Stat. L. 641; Act of April 8, 1812, 2 Stat. L. 701. Alabama: Act

of March 2, 1819, 3 Stat. L. 489, secs. 5, 6; Resolution of Dec. 14, 1819; *Id.*, p. 608. Missouri: Act of March 6, 1820, 3 Stat. L. 545, sec. 2.

⁶ *Williams v. Beardsley*, 2 Ind. 591; *Mississippi River Bridge Co. v. Longergan*, 91 Ill. 508, 515; *Phoebe v. Jay, Breese*, 207. See *Illinois River Packet Co. v. Peoria Bridge Ass'n*, 88 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266, 271; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237.

⁷ 3 How. 212.

⁸ *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159; *Dred*

It was, however, the court said, a valid regulation of commerce which Congress, in the exercise of its commercial powers, might impose upon the original States in respect to their navigable waters; and, following this decision, the clause which had been already inserted in so many organic acts of admission was re-enacted in the case of Iowa,¹ Wisconsin,² California,³ Oregon,⁴ and Minnesota.⁵

In a number of cases the validity of this legislation was presented to the courts, and was for some time uniformly sustained;⁶ and this rule was followed as recently as the case of *Wallamet Iron Bridge Co. v. Hatch*,⁷ decided in 1884. It was recognized that Congress cannot admit a State into the Union upon any other than an equal footing with the other States, and therefore cannot, as a condition of admission, make any valid compact or enactment denying to a State within its limits the powers common to the other States. A stipulation between a State and the United States, or an express enactment of Congress, that a State is admitted into the Union on an equal footing with the original States, adds nothing as to its rights and authorities, for the implications from the fundamental principles of the Constitution require that the rights and powers of the several States should be the same.⁸

Scott v. Sanford, 19 How. 393, 490; 7 Op. Atty. Gen. 571; *Strader v. Graham*, 10 How. 82; *Withers v. Buckley*, 20 How. 84, 92; *Permoli v. First Municipality*, 3 How. 589, 610; *Menard v. Aspasia*, 5 Pet. 505; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U.S.) 158, 162; *Duluth Lumber Co. v. St. Louis Boom & Imp. Co.*, 17 Fed. Rep. 419. See also the following cases in which other provisions of this ordinance have been held to be superseded: *Conn. Mut. Life Ins. Co. v. Cross*, 18 Wis. 109; *People v. Thompson*, 155 Ill. 451. *Conf. Mil. Gaslight Co. v. Gamecock*, 23 Wis. 144.

¹ Act of March 3, 1845, 5 U. S. Stat. L. 742, sec. 8.

² Act of April 6, 1846, 9 Stat. L. 56, sec. 3.

³ Act of Sept. 2, 1850, 9 Stat. L. 452.

⁴ Act of Feb. 14, 1859, 11 Stat. L. 383.

⁵ Act of Feb. 26, 1857, 11 Stat. L. 166, sec. 2.

⁶ *Columbus Insurance Co. v. Curtienius*, 6 McLean, 209; *Columbus Insurance Co. v. Peoria Bridge Co.*, 6 McLean, 70. *Conf. Spooner v. McConnell*, 1 McLean, 337; *Neaderhouser v. State*, 28 Ind. 257.

⁷ 19 Fed. Rep. 347.

⁸ *St. Anthony Falls, etc. Co. v. St.*

It is said, however, that though the clause in the organic act admitting a State into the Union, by which its navigable waters were made free and common highways, could not be upheld as a compact between the State and the United States, it was, nevertheless, a valid regulation of commerce by Congress. Admission of the State and enactment of the regulation were simply coincident in time. The State was admitted unconditionally, and the regulation enacted absolutely, as it might have been enacted on the day before or the day after the admission. But even if it had been made a condition of admission, it would nevertheless be valid as an act of Congress, because that body had the power to make the regulation without State consent.¹

Upon this proposition no explicit decision has been given by the Supreme Court, but it is settled that the construction of the clause referred to requires only that the highway shall be open to all without preference to any, and unobstructed by duties and tolls not collected for the use of improvements.²

The question is still open whether the free navigation clause in the Ordinance of 1787, and the similar provision in the acts admitting different States into the Union, are in effect as regulations of commerce. As concerns the Ordinance, there seems to be no doubt that, if it is still effective,

Paul, 168 U. S. 349; Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 434; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1; Sands v. Manistee River Improvement Co., 123 U. S. 288; Hamilton v. Vicksburg, S. & P. R. Co., 119 U. S. 280, affirming 84 La. Ann. 978; Huse v. Glover, 119 U. S. 543, 15 Fed. Rep. 292; Cardwell v. American Bridge Co., 118 U. S. 205; Woodman v. Kilbourn Mfg. Co., 1 Abb. (U. S.) 158; Pollard's Lessee v. Hagan, 8 How. 212; Duluth Lumber Co. v. St. Louis Boom & Improvement Co., 5 McCrary, 382. See Scheurer v. Columbia Street Bridge Co., 37 Fed. Rep. 172.

¹ Woodruff v. Bloomfield, etc. Co., 8 Sawy. 628, 9 id. 441; Cox v. State, 8 Blackf. 198, 200; Depew v. Canal Trustees, 5 Ind. 8; Neaderhouser v. State, 28 Ind. 257; Peters v. New Orleans R. Co., 56 Ala. 523, 535. Conf. New Orleans v. Wilmot, 31 La. Ann. 65.

² Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1; Hamilton v. Vicksburg, etc. R. R. Co., 119 U. S. 280, 84 La. Ann. 970; Huse v. Glover, 119 U. S. 543; Cardwell v. American Bridge Co., 118 U. S. 205.

its force is due solely to Federal legislation. Whatever the jurisdiction of the Congress of the Confederation over public lands might have been, it possessed no power to regulate commerce among the States; and unless it could make its provision for free navigation run with the land, so as to be effective as a limitation upon the powers of States to be thereafter formed in territory governed by the Ordinance, it would be ineffective within the limits of those States. It is now settled that the Ordinance does not limit State powers, and its commercial regulations therefore have no longer intrinsic force.

Under the Constitution conditions are reversed. Exclusive power to regulate commerce among the States belongs to Congress, and provisions for free navigation of public waters of the United States, if adopted by Congress as commercial regulations, are undoubtedly valid. The question will therefore be determined by reference to Federal legislation, and may be different in different States.

Perhaps with the construction now given to this clause the question is unimportant, for the acts which fall within its prohibition are probably within other prohibitions of the Constitution. "These provisions may now, perhaps, be regarded as declaratory of the modern rule, that all rivers which are capable of navigation in their natural condition are subject to public use for that purpose, whether in other respects they are held to be private property or not."¹

Before the decision in *Hatch v. Willamette Iron Bridge Co.*, a large number of decisions were rendered, defining freedom of navigation as secured by the clause referred to, or by similar clauses in organic acts admitting States into the Union.

The question what constituted a navigable stream was said to be one of fact.² Streams which were not navigable at the time the Ordinance was adopted might be made so by artificial means, and streams which were navigable at that time

¹ Gould on Waters (2d ed.), sec. 63. 279; Moore v. Sanborn, 2 Mich. 519;

² Burroughs v. Whitwam, 59 Mich. Egan v. Hart, 45 La. Ann. 1858.

might, in the natural course of events, cease to be so; and where this was the case, the court would recognize the fact and would not enforce the claim of a single individual seeking to navigate such a stream.¹

It was also held that under the Ordinance, as under the Constitution, the States might, in the absence of legislation by Congress, improve the navigation of waters within their limits and charge tolls for the use of such improvements.² In making improvements the States might consider the character of navigation which was most important, and improvements might be made with reference to that method of use. Thus, where a stream was of greatest importance in floating logs, the States might authorize the construction of booms, although they constituted an obstruction to navigation by boats.³

The Ordinance and the free-navigation clauses in statutes admitting States into the Union did not deprive the States of the power to authorize erection of bridges over navigable waters, provided that in so doing the waterway was not unnecessarily obstructed.⁴

¹ *State v. Carpenter*, 68 Wis. 165; *Keator Lumber Co. v. St. Croix Boom Co.*, 73 Wis. 62; *Ingraham v. Chicago, D. & M. R. R. Co.*, 34 Iowa, 249; *Pacific Gas Improvement Co. v. Ellert*, 64 Fed. Rep. 421. *Conf. Ligare v. Chicago, etc. Ry. Co.*, 166 Ill. 249.

² *Sands v. Manistee River Improvement Co.*, 128 U. S. 288; *Huse v. Glover*, 119 U. S. 543, 15 Fed. Rep. 292; *Manistee Improvement Co. v. Sands*, 53 Mich. 593; *Nelson v. Cheboygan Slack Water Navigation Co.*, 44 Mich. 7; *Benjamin v. Manistee Improvement Co.*, 42 Mich. 626; *La Plaisance Bay Harbor Co. v. City of Monroe, Walker's Ch. (Mich.)* 155; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255.

³ *Pound v. Turck*, 95 U. S. 459;

Escanaba Transportation Co. v. Chicago, 107 U. S. 678; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Palmer v. Commissioners of Cuyahoga County*, 8 McLean, 226; *Hatch v. Willamette Iron Bridge Co.*, 7 Sawy. 127; *People ex rel. v. Potrero Bay View R. Co.*, 67 Cal. 166; *City of Chicago v. McGinn*, 51 Ill. 266; *Illinois River Packet Co. v. Peoria Bridge Ass'n*, 38 Ill. 467; *Board of Commissioners v. Pidge*, 5 Ind. 18; *Williams v. Beardsley*, 2 Ind. 591; *Commissioners v. Board of Public Works*, 39 Ohio St. 628; *Hutchinson v. Thompson*, 9 Ohio, 52; *Sweeney v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 60.

Federal Legislation Concerning Navigable Waters.—The navigable waters of the United States have been the subject of a large number of statutes.¹ Of these the most important, by reason of their general effect, are the several statutes prohibiting alterations or obstructions in navigable waters.²

By these acts it is provided that whenever the Secretary of War shall have good reason to believe that any bridge over navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, or where there is difficulty in passing the opening of such

¹ Beside the numerous appropriations for rivers and harbors, see Act of May 18, 1796, Rev. Stats., sec. 2476, declaring all navigable rivers within territory occupied by public lands to be and remain public highways.

Act of March 3, 1811, Rev. Stats., sec. 5251, declaring all navigable rivers in former territories of Orleans and Louisiana to be and remain public highways. See also Rev. Stats., tit. LXIII, Rivers and Harbors, secs. 5244, 5255, and Act of May 1, 1882, Supp. R. S. 888.

Act of June 8, 1872, Rev. Stats., sec. 8964, establishing all the waters and canals of the United States as post roads during the time the mail is carried thereon.

Act creating Mississippi River Commission, June 28, 1879, 21 Stats. L. 37, Supp. R. S. 268.

Act creating Missouri River Commission, July 5, 1884, 23 Stats. L. 144, Supp. R. S. 465.

Act creating California Debris Commission to protect Sacramento and San Joaquin rivers and their tributaries, March 1, 1883, 27 Stats. L. 507.

As to harbor of New York, see

Act of June 29, 1888, 25 Stats. L. 209, Supp. R. S. 594; with addition and amendment August 18, 1894, 28 Stats. L. 360.

Use of canals owned or operated by the United States is regulated by Secretary of War, Act of August 18, 1894, 28 Stats. L. 362.

Use of drawbridges over navigable waters is regulated by the Secretary of War, Act of August 18, 1894, 28 Stats. L. 362. See also act for regulation of commerce and navigation, December 31, 1792, with its amendments. U. S. R. S., tit. XLVIII, sec. 4181 et seq.

Also Act of June 7, 1897, 1st Session 55th Cong. 96, in regard to navigation of inland waters.

Anchorage and movement of vessels in port of Chicago is governed by Act of February 26, 1893, 27 Stats. L. 481, 2 Supp. R. S. 77.

² Act of August 14, 1876, 19 Stats. L. 132, Supp. R. S. 118; Act of July 5, 1884, 23 Stats. L. 144, Supp. R. S. 466; Act of August 11, 1888, 25 Stats. L. 400, Supp. R. S. 610; Act of September 19, 1890, 26 Stats. L. 436, Supp. R. S. 800; Act of July 18 1892, 27 Stats. L. 110; Act of August 18, 1894, 28 Stats. L. 363.

bridge by rafts, steamboats or other water-craft, the Secretary, after giving the interested parties a hearing, may specify the changes which he requires and limit the time in which they shall be made. Failure to comply with such requirement is a misdemeanor.

It is made unlawful to throw any ballast, gravel or other material into navigable waters of the United States so as to impede navigation. This prohibition does not, however, prevent unloading from vessels material to be used in repairing or building piers, wharves, etc.; nor does it extend to the unloading of material, excavated in the improvement of navigable waters, at such place as the officers supervising the improvements shall approve; nor does it prevent the deposit of any substance in navigable waters under permit from the Secretary of War in any place designated by him, where navigation will not be obstructed thereby.

It is forbidden¹ to build any structure outside established harbor lines, or in navigable waters of the United States where no harbor lines are established, without permission of the Secretary of War, in such manner as shall obstruct or impair navigation; and it is not lawful to commence construction of any bridge, causeway or other works in any navigable waters of the United States, under any act of the legislative assembly of a State, until the location and plan of such bridge or other works has been submitted to and approved by the Secretary of War. The statutes also prohibit excavating, filling or in any manner altering or modifying the course, location, condition or capacity of any port, roadstead, harbor or channel of navigable waters of the United States, unless approved and authorized by the Secretary of War; provided, however, that this prohibition shall not apply to any bridge, piers or abutments theretofore authorized by law, nor shall the statutes be construed to authorize the construction of any bridge, piers, abutments or other works, under an act of the legislature of any State, over or in any stream or other water not wholly within the limits of such State.

¹Sec. 7, Act of 1890, as amended in Act of 1892, 27 Stat. L. 110.

Wrecks of vessels and other obstructions in navigable waters which are permitted by the owners thereof to remain, to the injury of commerce and navigation, for a longer period than two months, shall be broken up and removed by the Secretary of War, without liability for damage.

No person is permitted to use for any exclusive purpose, or to build upon, alter, deface, injure, obstruct, or in any other manner impair the usefulness of any sea-wall, dike, wharf, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, etc.

The creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction is prohibited, and the continuance of such construction, except bridges, piers, wharves, and other similar structures, erected for business purposes, constitutes an offense, and each week's continuance of such obstruction is deemed a separate offense.

Every person creating or continuing such an unlawful obstruction is guilty of a misdemeanor, and the obstruction may be prevented or removed by an injunction of the United States court, and proper proceedings to this end may be instituted under direction of the Attorney-General of the United States.

Where it is manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation of harbors, he is authorized to establish lines beyond which no piers or other works shall be extended, or deposits made, except under such regulations as he may prescribe from time to time.

The act of August 18, 1894,¹ contained further provisions against the obstruction of navigable waters. By this act it is made unlawful to deposit or discharge, by any process, ballast, refuse, ashes, mud, acid or any other matter, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the

¹ 28 Stat. L., ch. 290, p. 388.

United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War. Every master, pilot, engineer, or person acting in such capacity on any boat or vessel, who may wilfully injure or destroy any work of the United States in navigable waters, or who shall knowingly engage in towing any scow, boat or vessel loaded with prohibited matter, for deposit or discharge in any harbor, elsewhere than within limits permitted by the Secretary of War, is guilty of a misdemeanor, and the boat is liable for the pecuniary penalties imposed by the act, and in addition thereto for the amount of damages which it may have caused.

The powers which are by this act delegated to the Secretary of War are very large, and there has been a difference of opinion as to the validity of the statute in this respect, some courts supporting the act¹ and other courts holding it to be unconstitutional.² By the fourth section of the act of September 19, 1890, the Secretary is directed, whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation, to give notice to parties owning or controlling the same, and, after the hearing, to direct such alterations as he may think necessary; failure to comply with such direction being made a misdemeanor, and the Secretary being authorized to direct the institution of criminal proceedings. The question which is submitted to the Secretary is whether or not a bridge or other structure constitutes an unreasonable obstruction to navigation, and his decision is final and conclusive. It has been held that the power which it is thus attempted to delegate to an administrative officer is legislative, and that the statute in this respect is unconstitutional.³

There is no doubt that Congress can confer upon an execu-

¹ Oregon Transportation Co. v. Rep. 406; United States v. Keokuk, Columbia St. Bridge Co., 53 Fed. etc. Bridge Co., 45 Fed. Rep. 178. Rep. 549.

² United States v. Rider, 50 Fed. Rep. 406.

³ United States v. Rider, 50 Fed. Rep. 406.

tive officer the authority to determine certain facts upon which the right to construct or maintain an obstruction in navigable waters may be made to depend. Congress may, for example, direct the Secretary of War to ascertain whether a given structure conforms in fact to the requirements of the act of Congress authorizing its erection, and may authorize him to prescribe changes that may be needed to make it conform thereto. Congress may authorize a bridge in accordance with plans to be adopted by the Secretary of War;¹ but it seems that Congress cannot give to the Secretary of War the right to declare that bridges lawfully erected are obstructions to free navigation, and must be remodeled or removed. Where a bridge has been authorized by Congress, the only authority which could make it an unlawful structure, or direct alterations, would be the authority which could repeal or amend the statute. And where a bridge has been authorized by a State, the only authority which could make it an unlawful structure, or require alterations, would be either the legislature of the State or Congress itself, under the authority to regulate commerce.

Every bridge creates some obstruction to free navigation, and a literal construction of the statute would therefore compel the Secretary of War to require the alteration or possible removal of nearly every bridge in the country that spans a navigable river. If, to escape this conclusion, it be held that the act requires only the alteration of bridges that cause an unreasonable obstruction to navigation, and that the Secretary of War must determine in each case whether the bridge is or is not an unreasonable obstruction, the conclusion would follow that the section in question confers upon the Secretary the duty of determining how much of an obstruction the public interests require shall be placed in the way of free navigation — a question which belongs to Congress alone. It is generally accepted that Congress cannot confer upon the Secretary of War the power to determine

¹ *Miller v. Mayor of New York*, 109 U. S. 335.

when and where bridges shall be built over the navigable rivers of the country. Such a power is substantially the power to determine what obstructions are unreasonable, and what obstructions are reasonable and demanded by public interests.¹

In *Lake Shore & Michigan Southern Ry. Co. v. Ohio*,² this statute received consideration from the Supreme Court. The question in that case concerned the right of the railroad to maintain a bridge over a small stream wholly within the limits of the State of Ohio, and it was held in the State courts that the bridge had been erected and was maintained without the consent of the State by abuse of State franchises, and that it was a public nuisance impeding navigation of the river. On behalf of the railway company it was contended that the statute in question applied to all waterways of the United States, whether wholly within a State or not; and that its effect was to deprive the States of all authority to control or regulate any structure over navigable streams, although wholly situate within their territory. In passing upon this question the court said: "On the face of this statute it is obvious that it does not support the claim based upon it. Conceding, without deciding that the words 'waterways of the United States' therein used, apply to all navigable waters, even though they be wholly situated within a State, and passing, also, without deciding, the contention, that Congress can lawfully delegate to the Secretary of War all its powers to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. The mere delegation to the Secretary of War of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor

¹ *United States v. Keokuk, etc.* ² 165 U. S. 835.
Bridge Co., 45 Fed. Rep. 178.

does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. When the distinction between an authorized structure so erected as to impede commerce, and an unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretation claimed were to be given to the act, its necessary effect would be that Congress, in creating an additional means to control bridges erected by authority of law, had, by implication, confirmed and made valid every bridge built without sanction of law."

The question as to the validity of the statute appears in a different light when it concerns the authority of the Secretary to carry out improvements directed by Congress. In *United States v. City of Moline*,¹ the question concerned the power of the Secretary to direct an alteration in a bridge which had been erected by authority of Illinois over Rock river, a stream wholly within its limits. It was shown that Congress had assumed jurisdiction over the river to make a navigable waterway from the Illinois river to the Mississippi; that the bridge, being without a draw, was a complete obstruction to navigation; and that the Secretary had directed certain changes so as to make the river practically navigable. This the court held a legal requirement.

The act of the Secretary in requiring passage was, in effect, an incident only to the execution of the larger purposes of Congress respecting Rock river. In passing upon this subject Judge Grosscup said:

"If congress can, by special act, constitutionally endow the arm of the secretary of war with power to remove everything that lies in or across that river obstructive to the proposed waterway, why may it not grant such power, with equal efficacy, by a general act applying to all cases as they

¹ 83 Fed. Rep. 592.

arise?" . . . "It is true that this involves decision of the department, but the department can in no instance be an effective, and at the same time an insensate and unjudging, executive instrument. In administrative undertakings of this character the directions cannot be so completely fore-drawn by congress that there will be left no questions to the administrative mind to decide. The test of the legality of the delegation of power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?

"In this case two questions alone arise: First. Is the bridge an obstruction to navigation? Second. Is it there by any such legal right that the government may not interfere with it in the respect designated, without just compensation? The first question is purely administrative, and is one that congress can certainly delegate to the secretary of war. A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately. The second question is, undoubtedly, judicial, and for that very reason is not subject, constitutionally, to the decision of congress any more than of the secretary of war."

The seventh section of the Act of September 19, 1890,¹ goes considerably beyond the fourth section in the extent of the powers which it confers upon the Secretary of War. The construction placed upon the fourth section by the Supreme Court appears to be that it gives to the Secretary substantially nothing more than the power of determining the fact whether the obstruction in question is an impediment to navigation. If it be an impediment it is prohibited by the statute.

¹Supp. U. S. Rev. Stats. p. 800, amended by Act of July 18, 1892, 27 Stat. L. 110.

The seventh section provides that it shall not be lawful to build any structure in navigable waters of the United States so as to obstruct or impair navigation without the permission of the Secretary of War. If, by this provision, it is intended to give to the Secretary authority to determine whether an obstruction to navigation may be permitted, the act seems to be a delegation of legislative power.

Other instances of such legislation may be found in the provision of the fourth section of the Interstate Commerce Act giving to the Commission power, from time to time, to prescribe the extent to which designated carriers may be relieved from the operation of the long-and-short-haul clause, and in the provision of the act giving the Commission the apparently judicial power of conducting an investigation to determine whether or not accused persons had been guilty of past violation of the law.¹ So in the act of March 2, 1893,² requiring equipment of railway cars and locomotives with certain safety appliances, it is provided that the Interstate Commerce Commission may, from time to time, on full hearing and for good cause, extend the period within which any common carriers shall be required to comply with the provisions of the act.

An extreme instance of such a statute is found in the act which authorizes the President to restrict and regulate, or to prohibit, the importation and use of fire-arms, ammunition and distilled spirits into the Territory of Alaska.³

In *Field v. Clark*⁴ the Supreme Court considered the provision of the Tariff Act of October 1, 1890, which authorized the President to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. In this case the court reviewed a large number of similar

¹ *Int. Com. Com. v. Brimson*, 154 U. S. 449, 155 U. S. 3. of Distilled Spirits, 83 Fed. Rep. 1000; *Endleman v. United States*,

² 27 Stat. L. 531.

86 Fed. Rep. 456.

³ 15 Stat. L. 241, U. S. Rev. Stats.

⁴ 148 U. S. 649, 661.

1955; *United States v. Fifty Cases*

provisions in earlier statutes, and held that the settled practice of the government recognized their validity.¹

Property Rights Relating to Navigable Waters.—The title and rights of riparian owners, in the soil below high-water mark, upon navigable waters depend upon the local laws of the States, except so far as those laws yield to the paramount right of commerce and navigation secured by the Constitution and the statutes of Congress.² In *Shively v. Bowlby*,³ the subject received exhaustive examination from Mr. Justice Gray, and in the recent case of *St. Anthony Falls Water Power Co. v. St. Paul*⁴ was again considered at length by Mr. Justice Peckham.

In general terms the riparian owner is entitled to access to his property from the stream,⁵ and has the right to build piers and wharves from the bank to the line of navigability.⁶

In all cases, however, the rights of the riparian owner are subject to the public easement, and if he extend a structure beyond the point of navigability, or impede the highway, over which the right of the public is paramount, he creates a public nuisance, which persons specially injured thereby are entitled to abate or enjoin.⁷

Persons owning land under or bordering upon navigable

¹ On general subject, see *post*, p. 309.

² *St. Anthony Falls Water Power Co. v. St. Paul*, 168 U. S. 349; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387; *United States v. Illinois Central R. R. Co.*, 83 Fed. Rep. 780; *Weber v. Board of Harbor Commissioners*, 18 Wall. 87; *Mayor, etc. of Mobile v. Eslava*, 9 Port. (Ala.) 577; *Duval's Heirs v. McLosky*, 1 Ala. 706; *Kemp ex dem. Pollard's Heirs v. Thorp*, 3 Ala. 291; *People ex rel. Burnham v. Jones*, 49 Hun. 365; s. c., 2 N. Y. Supp. 145; s. c., 110 N. Y. 509, 113 N. Y. 597; *People ex rel. Attorney-General v. Kirk*, 162 Ill. 138; *Lewis v. City of Portland*, 25 Oreg.

133; *Mumford v. Wardell*, 6 Wall. 423; *Allen v. Forrest*, 8 Wash. 700; *Morse v. O'Connell*, 7 Wash. 117; *Eisenbach v. Hatfield*, 2 Wash. 386; *People v. Revell (C. C. Cook Co., Ill.)*, 29 Chic. Leg. N. 885.

³ 152 U. S. 1; *Bowlby v. Shively*, 22 Oreg. 410.

⁴ 168 U. S. 849.

⁵ *Gould on Waters* (2d ed.), sec. 149; *Sage v. New York*, 154 N. Y. 61.

⁶ *Gould on Waters* (2d ed.), sec. 149.

⁷ *Dutton v. Strong*, 1 Black, 132; *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854; *Grand Trunk Ry. v. Backus*, 46 Fed. Rep. 211; *Northern Pacific Ry. Co. v. Barnesville &*

waters of the United States hold their property subject to the servitude in respect to navigation created by the Constitution; and where, without a taking of property, their land is injured or its use interfered with, in consequence of improvements to navigation made by the Federal government in the exercise of its dominant authority,¹ or by the action of a State,² no right to compensation exists. So, although the construction of bridges and dikes may lessen the value of a ferry franchise, it confers upon the owner no right to compensation.³

The power to regulate commerce, which is granted to Congress by the Constitution, is subject to all limitations imposed by that instrument, and among these is the requirement that private property shall not be taken for public use without just compensation, and if, in the regulation of commerce, Congress deems it necessary to take private property, it can do so only upon this condition. "The power to regulate commerce is not given in any broader terms than that to establish post-offices and post roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."⁴

M. Ry. Co., 2 McCrary, 244; *Works v. Junction Ry. Co.*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Sullivan v. Moreno*, 19 Fla. 200.

¹*Gibson v. United States*, 166 U. S. 269; *Cooley*, Const. Lim. (6th ed.) 666, 670; *Paine Lumber Co. v. United States*, 55 Fed. Rep. 854; *Scranton v. Wheeler*, 57 Fed. Rep. 808; *Mills v. United States*, 46 Fed. Rep. 738; *Hawkins Point Lighthouse Case*, 89 Fed. Rep. 77; *Covington Harbor Co. v. Phoenix Bridge Co.*, 23 W. L. B. (Sup. Ct. Cin.) 84; *Winifrede Coal Co. v. Central R. & B. Co.*, 24 id. 173; *Soil Under Navigable Waters*, 16 Op. Atty. Gen. 479;

Imp. of Navigable Waters, 17 id. 109; 18 id. 64; *Scranton v. Wheeler* (Mich.), 71 N. W. Rep. 1091. *Conf. Dam at Lake Winnibigoshish*, 16 Op. Atty. Gen. 552.

²*Transportation Co. v. Chicago*, 99 U. S. 635; *Zimmerman v. Union Central Co.*, 1 W. & S. 846; *Brooks v. Cedar Brook Imp. Co.*, 82 Me. 17; *Black River Imp. Co. v. La Crosse, etc. Co.*, 54 Wis. 659; *Sage v. New York*, 154 N. Y. 61. *Conf. Thunder Bay, etc. Co. v. Speechly*, 81 Mich. 386.

³*Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508.

⁴*Monongahela Navigation Co. v. United States*, 148 U. S. 812, 836.

The Federal statute permitting railroads and telegraph companies to use materials from public land is not an appropriation for the purpose of interstate or foreign commerce of the land under water upon which a railroad or telegraph may be constructed, so as to prevent a riparian owner, injured by such construction, from recovering damages therefor.¹ A pier built in a river by a riparian owner, though not in conformity with Federal law, cannot be taken by a railroad company without compensation.² The banks of the stream are subject to the control of the State, not of Congress. The rights which the public have are rights of passage, not of using the adjoining land.³ The State may not impede the use of the stream as a highway, and the use of the submerged land is always subject to the limitation that there shall be no substantial impairment of the public interest in the waters.⁴ A State may not, therefore, permit the appropriation of submerged land in an important channel to private use so as to exclude navigation,⁵ but may authorize its appropriation when navigation is not seriously injured.⁶

Police Jurisdiction Over Navigable Waters.—The police and criminal laws of the State, which operate upon all persons within its limits, extend also over its navigable waters. As persons navigating these waters are entitled to the benefit of State laws, they are also bound to yield obedience to them. The right of passage does not involve the right to occupy the highway as a residence;⁷ nor to make it, in violation of State laws, a place for public exhibitions;⁸ nor for the sale of liquors.⁹

¹ *Rumsey v. Railroad Co.*, 17 N. Y. S. 672.

² *Railway Co. v. Renwick*, 103 U. S. 180.

³ *Henry v. Roberts*, 50 Fed. Rep. 902; *Littlefield v. Maxwell*, 81 Me. 184; *State v. Wilson*, 42 Me. 9; *Gould on Waters* (2d ed.), sec. 99 et seq.; *Doucette v. Little Falls, etc. Co.* (Minn.), 73 N. W. Rep. 847; *Bainbridge v. Sherlock*, 29 Ind. 364.

⁴ *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387.

⁵ *Coxe v. State*, 144 N. Y. 396.

⁶ *Ormerod v. New York, etc. Co.*, 18 Fed. Rep. 870.

⁷ *Robertson v. Commonwealth* (Ky.), 40 S. W. Rep. 920.

⁸ *Board of Selectmen v. Spalding*, 8 La. Ann. 87.

⁹ *Pierson v. State*, 89 Ark. 219.

CHAPTER V.

PILOTAGE, PORT REGULATIONS, QUARANTINE, INSPECTION LAWS AND OTHER LOCAL MATTERS.

Many local regulations which are within the powers of the States appear to be essentially commercial in their character and purpose. Such, for instance, are regulations of pilotage, which bear no important relation to the police powers of the States, but are necessary that there may be easy entrance to and exit from a harbor. Under existing theories of constitutional construction, however, the power to make such regulations is not regarded as commercial in origin. When it is said that in local matters the States may act until superseded by Congress, it is intended to say that the States, in the exercise of other powers, are not prohibited from the use of all means which might be employed by Congress in effectuation of its general commercial power. On the other hand, no power belonging to the State can control the inhibitions of the Federal Constitution or the powers of the United States government created thereby.¹ Whatever may be the extent and nature of the powers of the States when not otherwise restricted, it has been said that no definition, and no urgency for their use, can enable a State to act upon matters which have been exclusively confided by the Constitution to the discretion of Congress.²

From the necessities of the case, however, certain limitations must be placed upon this broad statement, and the validity of State legislation must ultimately become a question of the extent of the necessity in which its laws have their origin.

¹ *Walling v. Michigan*, 116 U. S. 446, 460; 1 Dill Mun. Corp. (4th ed.), sec. 142.

² *Henderson v. The Mayor*, 98 U. S. 259, 271; *Railroad Co. v. Husen*, 95 U. S. 465.

The police and the taxing powers are for self-defense and self-maintenance; the urgency which may call for their exercise will, therefore, in supposable cases, justify marked exertions of State authority. This rule has its analogy throughout the law of agency,¹ and is expressed by the maxim that the safety of the people is the highest law. No authority can prevent the doing of that which must be done. It should be recognized, however, that in every case of this character the necessity for the exercise of the State authority is a jurisdictional fact which must exist before any invasion of the Federal commercial power can be justified.

Under ordinary circumstances the validity of State regulation is to be determined by the question:

1st. Whether the regulation proposed is strictly local in its operation, or whether it acts upon commerce in respects that admit of uniform rule throughout the country?

As a guide to this determination the courts will also consider:

2d. Whether the State authority is exercised in good faith, and is appropriate to the execution of some power belonging to the State?

The Purpose of a Statute is Disclosed in its Effect.—As early as the case of *Gibbons v. Ogden*² it was said that, in distinguishing between regulations of commerce and the exercise of reserved powers belonging to the State, the "different purposes mark the distinction between the powers brought into action." In *Henderson v. The Mayor*³ it was said that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect;" and again, in *Morgan's Steamship Co. v. Louisiana*,⁴ it was emphatically announced that "in all cases of this kind it has been repeatedly held that when the question is raised whether the State statute is a just exercise of State power

¹Green's Brice's *Ultra Vires* (2d Am. ed.), pp. 42, 71.

²9 Wheat. 235.

³92 U. S. 259, 268. See also Rail-

road Co. v. Husen, 95 U. S. 472; Collins v. New Hampshire, 171 U. S.

80.

⁴118 U. S. 455-462.

or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose." If a statute purporting to have been enacted in the exercise of the police power of the State has no real or substantial relation to the objects of that power, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.¹

The courts will not, however, inquire into the motives of legislators, except as they may be disclosed on the face of the statute under consideration, or may be inferable from its operation, considered with reference to the condition of the country and existing legislation, and with reference also to the condition of trade and manufacture within and without the legislating State.²

In most cases the law which has conflicted with Federal commercial authority has been enacted under the State police power. This is the power of self-defense which belongs to every State,—to protect life, liberty, property, public health and public morals. Any regulation which goes beyond what is appropriate for these purposes exceeds police power.³

PILOTAGE.

By the act of August 7, 1789,⁴ it was provided by Congress that pilotage should continue to be regulated by such laws as the States respectively should enact until further legislation on the subject by Congress. The form of this statute has attracted much comment,⁵ but the construction is now settled that the statute could not enlarge State pow-

¹ *Mugler v. Kansas*, 128 U. S. 628, 465; *In re Ah Fong*, 3 Sawy. 144; 661; *Minnesota v. Barber*, 136 U. S. 313, 350; *Hennington v. Georgia*, 168 U. S. 299, 303; *Scott v. Donald*, 165 U. S. 58. *Salzenstein v. Mavis*, 91 Ill. 891.

⁴ U. S. Rev. Stat., secs. 4285, 4296.

² *Soon Hing v. Crowley*, 118 U. S. 703; *Ex parte Brown*, 48 Fed. Rep. 435, 443; *Farris v. Henderson*, 1 Okl. 334. ⁵ See opinion of Mr. Justice McLean in the *Passenger Cases*, 7 How. 401, 402; also, opinion of Mr. Chief Justice Taney in the *License Cases*, 5 How. 590; *Banta v. McNeil*, 5 Ben. 74; *Weaver v. McLellan*, 5 Ben. 79.

³ *Railroad Co. v. Husen*, 95 U. S.

ers, and that it did not adopt future enactments. Its effect was to manifest the understanding of Congress that the power to legislate on this subject is not exclusive in the Federal government.¹

Following this practice the States have, ever since the adoption of the Constitution, established regulations of pilotage, fixing the qualifications of pilots; compelling them to serve when called upon,² and requiring vessels to accept their services;³ forbidding persons without a State license to act in this capacity,⁴ and requiring vessels to pay for their services whether accepted or not.⁵ These statutes apply to vessels navigating within a State, although they may not be bound to or from its ports. Thus, it has been held that pilot fees fixed by the State of Delaware may, under the Federal statute, be recovered from vessels navigating Delaware Bay, although bound to or from the port of Philadelphia, and notwithstanding a statute of Pennsylvania exempting vessels from the duty of taking a pilot.⁶

The States may fix charges for pilotage;⁷ may require a pilot who deserts his vessel to return the pay which he has

¹ *In re Rahrer*, 140 U. S. 545; *In re Spickler*, 48 Fed. Rep. 653.

² *Low v. Commissioners of Pilotage*, R. M. Charl. (Ga.) 302.

³ *State v. Penny*, 19 S. C. 218.

⁴ *People v. Sperry*, 50 Barb. 170; *People v. Board, etc. of Pilots*, 23 Hun, 608; *Barnaby v. State*, 21 Ind. 450.

⁵ *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 286; *Cooley v. Board of Wardens*, 12 How. 299; *Wilson v. McNamee*, 102 U. S. 572; *The Alcalde*, 80 Fed. Rep. 183; *The William Law*, 14 Fed. Rep. 792; *The Brig America*, 1 Lowell, 176; *Stillwell v. Raynor*, 1 Daly, 47; *Murray v. Clark*, 4 Daly, 468; *The George S. Wright*, Deady, 591; *Dryden v. Commonwealth*, 16 B. Mon.

598; *The Bark Alaska*, 8 Ben. 391; *Master, etc. of Port of New Orleans v. The Martha J. Ward*, 14 La. Ann. 287.

⁶ *The Clymena*, 9 Fed. Rep. 165, 12 Fed. Rep. 846; *The Alzena*, 14 Fed. Rep. 174; *The Agnes R. Bacon*, 16 Fed. Rep. 480; *Dryden v. Commonwealth*, 16 B. Mon. 598; *Neil v. Wilson*, 14 Oreg. 410; *Chambers v. S. S. Clymena*, 14 Phila. 608; *Hopkins v. Wyckoff*, 1 Daly, 176.

⁷ *The Agnes R. Bacon*, 16 Fed. Rep. 480; *Schooner Wave v. Hyer*, 2 Paine, 181; *Master of Port v. The Charles Morgan*, 14 La. Ann. 602; *The Bark Alaska*, 8 Ben. 391; *The Chase*, 14 Fed. Rep. 854; *Virden v. Brig Charles A. Sparks*, 13 W. N. C. 300.

received,—and both of these provisions may operate beyond the boundaries of the State;¹ but, as in all other cases of State legislation affecting commerce, regulation of pilotage is valid only when there is no discrimination in favor of citizens of the State making the regulation.²

The whole subject is within Federal control, and State regulations are superseded by Federal legislation.³

By such action, however, Congress does not repeal, but suspends the State law, and when the act producing this result is repealed, or modified so as to permit the operation of State law, it is again effective.⁴

PORT REGULATIONS.

“Upon similar grounds what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes are sustained. . . . The State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision. It may designate the wharves at

¹ *Willson v. McNamee*, 102 U. S. 572; *The Whistler*, 13 Fed. Rep. 395; *The Bark Nevada*, 7 Ben. 386; *Willson v. Mills*, 10 Abb. Pr. (N. S.) 143; *Peterson v. Walsh*, 1 Daly, 182; *Neil v. Wilson*, 14 Oreg. 410; *Chambers v. S. S. Clymene*, 14 Phila. 608. *Contra*, *Virden's Appeal*, 13 Phila. 151.

² U. S. Rev. Stat., sec. 4287; *Sprague v. Thompson*, 118 U. S. 90; *Thompson v. Sprague*, 69 Ga. 409; *Freeman v. The Undaunted*, 37 Fed. Rep. 662; *The Alameda*, 31 Fed. Rep. 366, 32 Fed. Rep. 331; *Chapman v. Miller*, 2 Spears (S. C.), 769.

³ U. S. Rev. Stat., secs. 4442, 4444; Act of April 17, 1874, 18 Stat. L. 30, Supp. R. S. 8; *Sturgis v. Spofford*, 45 N. Y. 446; *Henderson v. Spofford*, 59 N. Y. 181; *Hopkins v. Wyckoff*,

1 Daly, 176; *Dryden v. Commonwealth*, 16 B. Mon. 598; *Edwards v. S. S. Panama* (U. S. C. C. Oreg.), 1 Oreg. 418; *United States ex rel. Spink*, 19 Fed. Rep. 631; *Cisco v. Roberts*, 6 Bosw. (N. Y.) 494; *The Alzena*, 14 Fed. Rep. 174; *Rowland v. The South Cambria*, 27 Fed. Rep. 525; *The Abercorn*, 26 Fed. Rep. 877; *The Clymene*, 9 Fed. Rep. 165, 12 Fed. Rep. 346; *Cribb v. State*, 9 Fla. 409.

⁴ *Henderson v. Spofford*, 59 N. Y. 181, affirming 10 Abb. Pr. (N. S.) 140; Board of Commissioners v. Pacific Mail S. S. Co., 52 N. Y. 609; *Sturgis v. Spofford*, 45 N. Y. 446. *Conf. Commonwealth v. Calhane*, 154 Mass. 115; *In re Rahrer*, 140 U. S. 545, reversing 43 Fed. Rep. 556; *State v. Lord*, 66 N. H. 479.

which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels."¹ But where no services are rendered no charge can be made.²

It has therefore been held that State laws prohibiting the assumption of the title "Port Wardens" by persons not duly appointed,³ and requiring fees from vessels for services either rendered or tendered by Port Wardens⁴ duly appointed, are constitutional exercises of the municipal authority. Upon the same principle, State laws prohibiting the deposit of offal in certain rivers and bays,⁵ or prohibiting the floating of loose logs in rivers,⁶ or permitting such floating, even to the material obstruction of navigation,⁷ and establishing harbor

¹ Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-214; The James Gray v. The John Fraser, 21 How. 184; Vanderbilt v. Adams, 7 Cow. 349-351; Scott v. Wilson, 8 N. H. 321; Port Wardens v. The M. J. Ward, 14 La. Ann. 287; Cisco v. Roberts, 36 N. Y. 292; Benedict v. Vanderbilt, 1 Robt. (N. Y.) 194, 25 How. Pr. 209; Green v. The Helen, 1 Fed. Rep. 916; The Clover, 1 Low. 342; City of Ogdensburg v. Lyon, 7 Lans. 215.

² Webb v. Dunn, 18 Fla. 721; Steamship Co. v. Port Wardens, 6 Wall. 81.

³ Curtin v. People, 26 Hun, 564.

⁴ Port Wardens v. The M. J. Ward, 14 La. Ann. 287; Port Wardens v. The Charles Morgan, 14 La. Ann. 602; Port Wardens v. Salvador Prats, 10 Rob. 459.

⁵ New York v. Ferguson, 28 Hun, 594; City of Ogdensburg v. Lyon, 7 Lans. 215.

⁶ Craig v. Kline, 85 Pa. St. 399; Harrington v. Connecticut River Lumber Co., 129 Mass. 580; Scott v. New Hampshire, 8 N. H. 321; Henry v. Roberts, 50 Fed. Rep. 202.

⁷ Heerman v. Beef Slough, etc. Co., 8 Biss. 334.

lines beyond which wharves shall not be constructed,¹ have all been sustained. But the only interference which the State, in its port regulations, may make with the landing and receiving of passengers and freight, is confined to such measures as will prevent confusion among vessels and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers or freight.²

WHARFAGE.

This is defined in *Transportation Co. v. Parkersburg*³ as "a charge against a vessel for using or lying at a wharf or landing, a rent charged by the owner of the property for its temporary use." A State or municipal corporation may, in the exercise of its legitimate authority, construct wharves in navigable waters, and require vessels landing at its port to put up at such wharves,⁴ and to pay a reasonable compensation for their use.⁵

It was at one time considered that a wharfage charge could be imposed upon a vessel landing or mooring in any part of the port, though it did not use a wharf or other improvement.⁶ The case in which this doctrine was announced

¹ *Yesler v. Washington Harbor Line Commissioners*, 146 U. S. 646; 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Guy v. Baltimore*, 100 U. S. 434; *Prosser v. Northern Pacific R. R.*, 152 U. S. 59; *Grand Trunk Ry. v. Backus*, 46 Fed. Rep. 211; *Act of Congress*, Sept. 19, 1890, Supp. R. S. 801; *Harbor Line Commissioners v. State ex rel. Yesler*, 2 Wash. 530; *State v. Board of Commissioners*, 4 Wash. 816.

² *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-206.

³ 107 U. S. 691.

⁴ *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 16 Fed. Rep. 890; *Packet Co. v. Catlettsburg*, 105 U. S. 559.

⁵ *Packet Co. v. St. Louis*, 100 U. S.

423; *Vicksburg v. Tobin*, 100 U. S. 430; *Guy v. Baltimore*, 100 U. S. 434; *Packet Co. v. Keokuk*, 95 U. S. 80; *The Ann Ryan*, 7 Ben. 20; *Sterrett v. Houston*, 14 Tex. 153; *Sweeney v. Otis*, 37 La. Ann. 520; *People v. Williams*, 64 Cal. 498; *Northwestern Packet Co. v. City of Louisiana*, 4 Dill 17; *Northwestern Packet Co. v. Clarksville*, 4 Dill 18; *Northwestern Packet Co. v. Hannibal*, 4 Dill 18; *Worsley v. Second Municipality of New Orleans*, 9 Rob. (La.) 824; *Northwestern Packet Co. v. St. Louis*, 4 Dill 10.

⁶ *Cannon v. New Orleans*, 27 La. Ann. 16.

was reversed by the Supreme Court,¹ and it is now well settled that wharfage charges can only be made as compensation for facilities actually furnished.²

A State may determine the rates which individuals may charge for the use of wharves, and may give a lien on vessels using wharves to secure payment. This lien may be enforced in admiralty,³ and the amount of the fees may be graded according to the tonnage of vessels, when this means is adopted to determine the value of services rendered, or of wharfage privileges.⁴ But when the charges are imposed upon a vessel without reference to value of service rendered, whether graded by tonnage or not, they are duties of tonnage within the constitutional prohibition.⁵

It is said that, as long as charges amount only to reasonable compensation for the facilities afforded, they constitute no tax upon commerce, no matter what may be done with the money collected.⁶ It has been said that the reasonableness of rates, in the absence of Federal legislation, is determined by the State law;⁷ but the more recent cases hold that this inquiry is open in the courts.⁸

¹ *Cannon v. New Orleans*, 20 Wall. 577.

² *New Orleans v. Wilmot*, 31 La. Ann. 65; *Sweeney v. The Lizzie E.*, 30 Fed. Rep. 876; *Shreveport v. Red River, etc. Line*, 37 La. Ann. 562; *Harbor Masters of Mobile v. South-erland*, 47 Ala. 511.

³ *Broeck v. John M. Walsh*, 2 Fed. Rep. 364; *Ex parte Easton*, 95 U.S. 68.

⁴ *Packet Co. v. Catlettsburg*, 105 U.S. 559; *Ouachita Packet Co. v. Aiken*, 121 U.S. 444, 16 Fed. Rep. 890; *Packet Co. v. St. Louis*, 100 U.S. 423; *Packet Co. v. Keokuk*, 95 U.S. 80; *Cannon v. New Orleans*, 20 Wall. 577; *Muscatine v. Packet Co.*, 45 Iowa, 185; *Keokuk v. Packet Co.*, *id.* 196; *First Municipality v. Pease*, 2 La. Ann. 538; *Ellerman v.*

McMains, 30 La. Ann., Part 1, 190; *Leathers v. Aiken*, 9 Fed. Rep. 679; *Cooley on Taxation*, p. 93.

⁵ *Inman S. S. Co. v. Tinker*, 94 U.S. 238; *Cannon v. New Orleans*, 20 Wall. 577; *Peete v. Morgan*, 19 Wall. 581; *State Tonnage Tax Cases*, 12 Wall. 204; *Steamship Co. v. Port Wardens*, 6 Wall. 31; *Johnson v. Drummond*, 20 Gratt. 419; *Board v. Pashley*, 19 S. C. 315.

⁶ *Leathers v. Aiken*, 9 Fed. Rep. 679.

⁷ *Ouachita Packet Co. v. Aiken*, 121 U.S. 444; *Transportation Co. v. Parkersburg*, 107 U.S. 691; *Sweeney v. Otis*, 37 La. Ann. 520. *Conf. Packet Co. v. Catlettsburg*, 105 U.S. 559.

⁸ *Post*, pp. 149, 180.

QUARANTINE.

Quarantine laws belong to that class of State legislation which is valid until displaced by Congress. "The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York."¹

The authority of the States in these matters has never been questioned, and receives express recognition in the United States statutes.² In the exercise of its laws a State acts upon the vessel, cargo, officers, seamen and passengers. It may require them to undergo examination; may interrupt the voyage for days or weeks; and may impose a charge upon the vessel to defray quarantine expenses. Such laws, whether passed with intent to regulate commerce or not, have that effect, and nevertheless are valid until displaced or contravened by some legislation of Congress.

In *Train v. Disinfecting Co.*³ it was held that a State may disinfect all rags arriving at its port, and make a charge therefor which shall be a lien upon the rags, and that the owner cannot be allowed to show that the rags did not need disinfection.

This case should be compared with that of *Railroad Co. v. Husen*,⁴ in which a statute of Missouri enacting that "no

¹ *Morgan, etc. Co. v. Louisiana*, 118 U. S. 455, 465; *Minneapolis, etc. Ry. Co. v. Milner*, 57 Fed. Rep. 276; *Railroad Co. v. Board of Health*, 36 La. Ann. 666.

² Acts of 1796 and 1799, 1 Stat. L. 474, 619; U. S. Rev. Stat., tit. 58; 20 Stat. L. 37; Act of April 29, 1878, 1 Supp. U. S. Rev. Stat., c. 66, p. 157; Act of March 3, 1891, 1 Supp. U. S. Rev. Stat., p. 934; Act of March 27, 1890, 1 Supp. U. S. Rev. Stat., c. 51,

p. 709. In the *Milner Case*, 57 Fed. Rep. 276, reference is made to the Act of February 15, 1893. In regard to transportation of animals and food products, see Act of March 3, 1891, 1 Supp. U. S. Rev. Stat., p. 937; Act of August 30, 1890, 1 Supp. U. S. Rev. Stat., p. 794.

³ 144 Mass. 523. See also *State v. Fosdick*, 21 La. Ann. 256.

⁴ 95 U. S. 465, reversing *Husen v. Railroad Co.*, 60 Mo. 226; *State v.*

Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year," and giving an action against persons violating the act for damages sustained on account of disease communicated by such cattle, was held invalid.

In this case the court looked at the effect of the statute to determine its purpose, which it found to be the obstruction of interstate commerce, and discrimination against the property of citizens of other States. In *Train v. Disinfecting Co.* no such purpose appears. It seems in this case to have been very properly suggested by the court that, as some things may be pronounced nuisances *per se*, certain articles, such as rags, may always be subject to quarantine regulations, and as, in the latter case, the statute extended no further than its proposed object, it was held to be a constitutional exercise of the State authority.

This power has been applied by different States, not only to goods and passengers arriving from foreign countries, but also to goods and passengers from other States. So an ordinance of St. Louis was sustained which provided that boats coming from below Memphis, having had on board at any time during the voyage more than a specified number of passengers, should remain in quarantine not less than forty-eight hours nor more than twenty days.¹

Closely associated with the right to establish quarantine regulations is the right of the State to exclude from its limits convicts, paupers, idiots, lunatics, and persons likely to become a public charge.² Such a right is limited by the

Duckworth (Idaho), 51 Pac. Rep. 456; *Gilmore v. Hannibal*, etc. R. Co., 67 Mo. 323. *Conf. Grimes v. Eddy*, 126 Mo. 163. *Contra, Yeazel v. Alexander*, 58 Ill. 254; *Mercer v. Kansas City*, etc. R. Co., 60 Mo. 397; *Kennedy v. Hannibal*, etc. R. Co., 62 Mo. 476; *Wilson v. Kansas City*, etc. Ry. Co., 60 Mo. 184. See *post*, p. 170.

¹ *St. Louis v. McCoy*, 18 Mo. 238; *St. Louis v. Boffinger*, 19 Mo. 13.

² *Railroad Co. v. Husen*, 95 U. S. 465, 471. See the following Federal statutes on this subject: Act of March 3, 1891, 26 Stat. L. 1084, Supp. Rev. Stat. 984. As to immigration of convicts and prostitutes, see Act of March 3, 1875, 18 Stat. L. 477,

right in which it has its origin — that of self-defense.¹ Beyond what is absolutely necessary for its self-protection, a State may not interfere with interstate commerce; and any statute which obstructs the entrance of persons who are neither paupers, vagabonds nor criminals, nor in any wise unsound in body or mind, is not an exercise of the police power of the State in any just sense of that term.²

Quarantine and Other Fees and Tolls Distinguished from Taxes.— A State cannot tax interstate commerce, and such a tax is not made valid by calling it an inspection fee, or a quarantine or wharfage due. The question is determined upon the facts and circumstances of the case, whether the payment demanded is actually a tax, or merely a compensation for services rendered. A tax is defined as “a contribution imposed by the government on individuals for the service of the state.”³ And where the whole or any part of such collections go to defray governmental expenses, it is perhaps the strongest evidence that the payment required is in fact a tax. On the other hand, where the amount contributed to the government is small, and the payment required is reasonably related to the service rendered, the evidence strongly supports the conclusion that such a requirement is not a tax, but is compensation for services. “A tax is a demand of sovereignty; a toll is a demand of proprietorship.”⁴

Thus, in *Philadelphia v. Telegraph Co.*,⁵ it was held that a

Supp. Rev. Stat. 86; Act of Aug. 3, 1882, 22 Stat. L. 214, Supp. Rev. Stat. 370. As to contract labor, see Act of Feb. 26, 1885, 23 Stat. L. 332, Supp. Rev. Stat. 479; Act of Feb. 23, 1887, 24 Stat. L. 414, Supp. Rev. Stat. 541; Act of Oct. 19, 1888, 25 Stat. L. 565, Supp. Rev. Stat. 633. Chinese exclusion laws, etc., Act of March 3, 1875, 18 Stat. L. 477, Supp. Rev. Stat. 86; Act of May 6, 1882, 22 Stat. L. 58, Supp. Rev. Stat. 86; Act of July 5, 1884, 23 Stat. L. 115, Supp. Rev. Stat. 458; Act of Sept. 13, 1888, see

note to Supp. Rev. Stat. 625; Act of Oct. 1, 1888, 25 Stat. L. 504, Supp. Rev. Stat. 625; Act of May 5, 1892, 27 Stat. L. 25.

¹ In re Ah Fong, 3 Sawy. 145.

² State v. Constitution, 42 Cal. 578; ante, p. 56.

³ Morgan v. Louisiana, 118 U. S. 455, 461.

⁴ State Freight Tax, 15 Wall. 232, 278; St. Louis v. Telegraph Co., 148 U. S. 92.

⁵ 40 Fed. Rep. 615, 83 Fed. Rep. 797. See Huse v. Glover, 119 U. S. 543.

municipal corporation could require reimbursement for its expense in regulating agents of interstate commerce, and that a collection from such agent of a very trifling surplus would not invalidate its action. But it was said that when a city demanded a large excess over the amount of its expenses, the charge became a tax pure and simple.

In *Patapasco Guano Co. v. State Board of Agriculture*,¹ a question was raised as to the validity of an inspection fee, on the ground that it exceeded the cost of inspection. The court noticed that the charge imposed was, in terms, levied to pay expenses of inspection, and refused to examine whether the amount was excessive, except to decide whether the fee was only colorably an inspection charge, or was in substance a tax.²

In the recent case of *City of St. Louis v. Telegraph Co.*,³ the same question was presented by an ordinance requiring a payment of five dollars a year for every telegraph or telephone pole placed in the streets. It was said by the court that the charge was in the nature of rental, not a tax; that the occupation of the streets by a company engaged in interstate commerce cannot be denied by the city; that all the city can insist upon, in this respect, is a reasonable compensation for the space in the streets which has been exclusively appropriated, and that it cannot, under these circumstances, be left to the city alone to determine what is a reasonable rental. "The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in this city."

On the other hand, where there has been no benefit conferred by the municipality, and the charge which it is sought to impose is not a compensation for services rendered or advantages given, it necessarily follows that it is beyond the power of the State.⁴

¹ 52 Fed. Rep. 690.

³ 149 U. S. 465, 148 U. S. 92.

² See also *Packet Co. v. Aiken*, 121 U. S. 444; *Neilson v. Garza*, 2 Woods, 287.

⁴ *Harmon v. City of Chicago*, 147 U. S. 896; *Cannon v. New Orleans*, 20 Wall. 577; *New Orleans v. Wil-*

All State regulations of commerce must be uniform, and any discrimination against other States, whether under the guise of inspection, pilotage, wharfage, or however made, is unconstitutional.¹

TAKING AND SALE OF GAME AND FISH.

The game within a State belongs to the people in their collective capacity. It is not the subject of private ownership, except as permitted by State law, and it is within the power of a State to control, restrict and regulate its taking by individuals.² In the enforcement of such laws a State may prohibit all traffic within its limits in the meat of game animals, without reference to the place where the animal was taken;³ and it may permit the taking of such animals within the State, but prohibit their exportation.⁴ It may also regulate the taking and transportation of shell fish and oysters,⁵ though Congress may regulate fishing by American vessels outside the boundaries of the States.⁶

mot, 81 La. Ann. 65; Railroad Co. v. Board of Health, 86 La. Ann. 666; Morgan v. Louisiana, 118 U. S. 455.

¹ Voight v. Wright, 141 U. S. 62; Minnesota v. Barber, 136 U. S. 813; Brimmer v. Rebman, 138 U. S. 78; Guy v. Baltimore, 100 U. S. 484; Georgia Packing Co. v. The City of Macon, 60 Fed. Rep. 774; Spellman v. New Orleans, 45 Fed. Rep. 8; Swift v. Sutphin, 89 Fed. Rep. 399; Ex parte Hanson, 28 Fed. Rep. 127; The Alameda, 81 Fed. Rep. 366; Freeman v. The Undaunted, 37 Fed. Rep. 662; Weil v. Calhoun, 25 Fed. Rep. 865; The John M. Welch, 18 Blatch. 54; Higgins v. Three Hundred Casks of Lime, 180 Mass. 1; Vines v. State, 67 Ala. 75; State v. Kline, 126 Ind. 68; Schmidt v. People, 18 Colo. 78; People v. Roberts, 25 Pac. Rep. 496; State v. North & Scott, 27 Mo. 464; Chapman v. Miller, 2 Spears (S. C.),

769; The Wharf Case, 3 Bland, Ch. (Md.) 361.

² Lawton v. Steele, 152 U. S. 133; United States v. Alaska Packers' Ass'n, 79 Fed. Rep. 152.

³ Magner v. People, 97 Ill. 331; Phelps v. Racey, 60 N. Y. 10; State v. Randolph, 1 Mo. App. 15; People v. O'Neil (Mich.), 68 N. W. Rep. 227; Roth v. State, 51 Ohio St. 209. Conf. Commonwealth v. Hall, 128 Mass. 410; Ex parte Maier, 103 Cal. 476. The contrary doctrine was laid down in Bennett v. Express Co., 63 Me. 236; State v. Saunders, 19 Kan. 127.

⁴ Geer v. Connecticut, 161 U. S. 519; State v. Geer, 61 Conn. 141. Conf. Bennett v. Am. Exp. Co., 83 Me. 237. *Contra*, State v. Saunders, 19 Kan. 127.

⁵ Bradshaw v. Lankford, 73 Md. 431.

⁶ United States v. Craig, 28 Fed. Rep. 795.

Each State owns the bed of navigable waters within its jurisdiction, unless it has been granted away,¹ and owns also the waters themselves and the fish in them, so far as they are capable of ownership. This title is subject to the paramount right of navigation, the regulation of which, as to foreign and interstate commerce, belongs to the United States. There has been, however, no grant to Congress of control over fisheries, and they therefore remain under the exclusive control of the State, which has the right, in its discretion, to appropriate its waters and their beds to be used as a common for the taking and cultivating of fish, so far as may be done without obstructing navigation. Such a use of submerged land is not a privilege of citizenship,² but a regulation by the people of the use of their common property. A State may prohibit the gathering,³ planting⁴ and taking of oysters within its limits.⁵ It may restrict to its own citizens, or residents, the right to take oysters and fish;⁶ may prevent oysters being taken by vessels owned by non-residents,⁷ and may place other restrictions upon their exportation.⁸ It may regulate the time⁹ and method¹⁰ of taking fish and oysters; may require a license for the privilege of

¹ *Shively v. Bowlby*, 152 U. S. 1; *Griffing v. Gibb*, 1 McAllister, 212.

² *McCready v. Virginia*, 94 U. S. 391; *State v. Applegarth*, 81 Md. 298; *Phipps v. State*, 22 Md. 380; *Boggs v. Commonwealth*, 76 Va. 969.

³ *Corfield v. Coryell*, 4 Wash. C. R. 871; *Haney v. Compton*, 7 Vroom, 507; *State v. Harrub*, 95 Ala. 176.

⁴ *McCready v. Commonwealth*, 27 Gratt. 985; *McCready v. Virginia*, 94 U. S. 391.

⁵ *Hess v. Muir*, 65 Md. 586, 601.

⁶ *In re Mattson*, 69 Fed. Rep. 535; *Chambers v. Church*, 14 R. I. 398; *Hess v. Muir*, 65 Md. 586, 601; *The Sloop Martha Anne*, *Olcott's Rep.* 18.

⁷ *Corfield v. Coryell*, 4 Wash. C. C. R. 871.

⁸ *State v. Harrub*, 95 Ala. 176; *State v. Northern Pac. Exp. Co.*, 58 Minn. 408; *Organ v. The State*, 56 Ark. 256. *Contra*, *Territory v. Evans*, 2 Idaho, 634; *Territory v. Nelson*, 2 Idaho, 638.

⁹ *Dunham v. Lamphere*, 3 Gray, 268; *Gentile v. State*, 29 Ind. 409; *People v. Reed*, 47 Barb. 235; *State v. Northern Exp. Co.*, 58 Minn. 408.

¹⁰ *Smith v. State of Maryland*, 18 How. 71; *Commonwealth v. Manchester*, 152 Mass. 380; *Manchester v. Commonwealth*, 139 U. S. 240; *Drew v. Hilliker*, 56 Vt. 641; *State v. Thompson*, 85 Me. 189; *Bennett v. Boggs*, 1 Baldwin, 60; *State v. Northern Pac. Exp. Co.*, 58 Minn. 408.

using a dredge,¹ and may impose a license tax upon the tonnage of boats engaged in the business.² The fact that a vessel has a Federal coasting license does not prevent the operation of State laws upon these subjects.³

It has been held that State statutes prohibiting the sale of fish and game at a time when they could not, under the law, be caught within the limits of the State was operative upon the sale of goods shipped from another State, the reason given being that the statute could not be enforced with reference alone to fish or game caught in the State.⁴

INSPECTION LAWS.

An inspection law is a law providing for the examination of personal property to determine whether it is in proper condition for sale. The authority of the State to enact such laws is expressly recognized by the clause of the Constitution which provides that "No State shall without the consent of Congress lay any duty or impost on imports or exports except what may be absolutely necessary for executing its inspection laws."

The decisions have established that this provision of the Constitution applies only to the foreign trade.⁵ So far as

¹ *Dize v. Lloyd*, 36 Fed. Rep. 551.

² *State v. Loper*, 46 N. J. Law, 321.
Contra, *Johnson v. Drummond*, 20 Gratt. 412. See *State v. Insley*, 64 Md. 28.

³ *Haney v. Compton*, 7 Vroom, 507; *Dize v. Lloyd*, 36 Fed. Rep. 551; *Smith v. Maryland*, 18 How. 71; *Dunham v. Lamphere*, 3 Gray, 268; *Commonwealth v. Manchester*, 152 Mass. 280; *Manchester v. Commonwealth*, 180 U. S. 240.

⁴ *People v. O'Neil* (Mich.), 68 N. W. Rep. 227; *Commonwealth v. Savage*, 155 Mass. 278; *Roth v. State*, 51 Ohio St. 209. *Conf. Commonwealth v. Hall*, 128 Mass. 410.

⁵ *Woodruff v. Parham*, 8 Wall

123; *Machine Co. v. Gage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 631; *Pittsburgh, etc. Coal Co. v. Louisiana*, 150 U. S. 590; *Patapece Guano Co. v. Board of Agriculture*, — U. S. —. As to the word "imports," etc., applied to interstate trade, see opinion of Mr. Chief Justice Taney in *Pierce v. New Hampshire*, 5 How. 504. In the case of *Fertilising Co. v. The Board*, 43 Fed. Rep. 609-612, it was suggested that the word "imports" might now be applied to interstate trade. "Were it not for the decision in *Woodruff v. Parham* we would not hesitate to say that the term 'import' included, as Chief

this trade is concerned, therefore, inspection laws apply not only to articles prepared for export, but also to articles brought into the States for trade.¹

Inspection of Articles of Interstate Commerce.—The inspection of articles transported from State to State involves considerations in many respects different from those which are involved in the inspection of articles of foreign commerce, and it may be that the rules applied in the two cases will not in all instances be the same. The Constitution contemplated that all duties on foreign goods imported into the country should belong to the general government as one of its sources of revenue. It was not expected that either the general government or the States should derive a revenue from commerce among the States.² It can well be understood that a State which desired to tax more heavily than Congress did, foreign liquors, tobacco, or other articles injurious to the community, or which interfered with their domestic policy, might be permitted to do so if the tax were approved by Congress, and the proceeds were paid to the United States. It seems improbable, however, that it was intended to permit such a tax to be imposed by neighboring States, each upon the commerce of the other for the use of

Justice Marshall evidently supposed that it did, goods brought from one State into another." It is clear, however, that the Circuit Court had not in mind later cases cited above, and which take the same view of this provision as that of the Woodruff case. At the same time, Mr. Justice Miller's statement, that at the time of the formation of the Constitution and its preceding discussion the words "exports" and "imports" were confined to foreign trade, is perhaps not altogether accurate. "The renunciation of the right of laying duties on imports from other States would

amount to a prohibition on imports from foreign countries, unless similar duties existed in other States." (Letter of Madison to Jefferson, Jan. 22, 1786.) "In this State (Pennsylvania) it is turning out more and more in evidence that the crop of wheat has been very scanty. The Eastern States always require large importations from the others." (Letter of Madison to Jefferson, Feb. 7, 1796.)

¹ *Addison v. Saulnier*, 19 Cal. 82.

² Views of President Monroe on Internal Improvements, inclosed in message to Congress, May 4, 1822.

the Federal government, and that Congress under this temptation was to arbitrate between the States.¹

There has been much doubt whether the inspection laws of a State might operate upon articles imported from other States. In the case of *Turner v. Maryland*,² among a large number of early inspection laws cited, there is none which imposes an inspection tax upon articles not grown or produced within the State enacting the law; and in the recent case of *Voight v. Wright*,³ the question of the extent to which such laws might operate was regarded as unsettled. It has recently been decided, however, that inspection laws may be applied to articles received from other States⁴ as well as to those intended for shipment to other States for sale.⁵

Inspection Means Examination.—An inspection law must necessarily provide for an official view or survey of personal property to distinguish between the good and the bad. A State may not forbid trade in any known article of commerce on account of its intrinsic nature and injurious consequences of its use and abuse. The very meaning of inspection is examination, and not exclusion without a hearing.⁶

Inspection laws operate upon personal property which is the subject of commerce. They cannot operate upon vessels or other means of transportation not themselves articles of

¹ *Woodruff v. Parham*, 8 Wall. 133.

² 107 U. S. 38.

³ 141 U. S. 62.

⁴ *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590; *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 52 Fed. Rep. 690; *Van Meter v. Spurrier*, 94 Ky. 122; *Goodwin v. Caraleigh Phosphate Works*, 119 N. C. 120; *Merriman v. Knox*, 99 Ala. 93; *Brown v. Adair*, 104 Ala. 652; *Goulding Fertilizer Co. v. Driver*, 99 Ga. 623; *City Council of Charleston v. Rogers*, 2 McCord, 495; *Glover v.*

Board, etc., 48 Fed. Rep. 348; *Cooley on Taxation*, p. 190; *Clark v. Board of Health*, 30 La. Ann. 1851; *Collins v. City of Louisville*, 2 B. Mon. 134; *State v. Pittsburg, etc. Coal Co.*, 41 La. Ann. 465; *Green v. The Mayor, etc. of Savannah*, R. M. Charl. (Ga.) 368; *State v. Fosdick*, 21 La. Ann. 256; *Hay Inspectors v. Pleasants*, 23 La. Ann. 349.

⁵ *Turner v. Maryland*, 107 U. S. 38.

⁶ *Railroad Co. v. Husen*, 95 U. S. 465; *Scott v. Donald*, 165 U. S. 53, 93.

trade.¹ The question to be determined is one that is capable of solution by immediate survey. A State may not, under the guise of inspection laws, exclude criminals or incompetent persons. "Neither at the time of the formation of the Constitution nor since, has any inspection law included anything but personal property as a subject of its operation."²

Moreover, it is not possible by inspection to determine who are habitual criminals, or who are unable to support themselves, and subject to become a public charge. An inspection is "something which can be accomplished by looking at, or weighing, or measuring the thing to be inspected, or by applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."³ In some cases, inspection, to be effective, requires chemical analysis, and it has been held that in these cases State requirements that the vendor shall furnish samples of his goods to the State chemist, and should label the product with the correct statement of its chemical ingredients, are valid.⁴

Purpose of Inspection to Exclude Unsound or Fraudulent Goods.—The purpose of the examination provided for by an inspection law is to ascertain whether the articles examined are fit for commerce and to protect the citizens and the market from fraud.⁵

The only question within the competency of the State authorities to decide is whether the article examined is, accord-

¹ *Railroad Co. v. Board of Health*, 86 La. Ann. 666.

² *People v. Compagnie Transatlantique*, 107 U. S. 59.

³ *People v. Compagnie Transatlantique*, 107 U. S. 62.

⁴ *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 845, 52 Fed. Rep. 690; *Goodwin v. Caraleigh Phosphate Works*, 119 N. C. 120; *Merriman v. Knox*, 99 Ala. 93; *Van*

Meter v. Spurrier, 94 Ky. 32; *Goulding Fertilizer Co. v. Driver*, 99 Ga. 623. *Contra*, *State v. Lagarde*, 60 Fed. Rep. 186.

⁵ *People v. Edye*, 11 Daly, 132; *Hospes v. O'Brien*, 24 Fed. Rep. 145; *People v. Pacific Mail Co.*, 8 Sawy. 640, 16 Fed. Rep. 344; *Van Meter v. Spurrier*, 94 Ky. 22; *State v. Fosdick*, 21 La. Ann. 256.

ing to commercial usages of the world, in a fit condition for commerce. It does not belong to the State to decide what articles shall be considered legitimate subjects of trade, nor to make an examination of imported articles for any other purpose than that of protecting the market.¹

Inspection May Include Form, Weight, etc.—This examination, however, need not be limited to a determination of the quality of the articles in question, but may extend also to their form, size and weight; but no unreasonable restriction may be placed on articles brought from other States or countries.²

The form and capacity of the package, and the mode of putting up and marking various articles, are recognized elements of inspection laws, "all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did, or did not, answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should co-exist in order to make a valid inspection law. Quality alone may be the subject of inspection without other requirements or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law."³ Measurements alone may be the object of an inspection law.⁴

In making such an examination it is not foreign to the character of an inspection law to require that the articles to be inspected shall be brought to the officer. This is a matter over which the State has reasonable discretion.⁵

¹ *Foster v. Master of the Port*, 94 U. S. 246, reversing *Master of the Port v. Foster*, 26 La. Ann. 105.

² *Higgins v. Three Hundred Casks of Lime*, 180 Mass. 1.

³ *Turner v. Maryland*, 107 U. S. 38, 55.

⁴ *Collins v. City of Louisville*, 2 B. Mon. 184.

⁵ *Turner v. Maryland*, 107 U. S. 38, 55 Md. 240.

Fertilizers.—It is of importance to every State to prevent the deterioration of its soil, and maintain the quality and quantity of its agricultural products; and it has been held that a State may require that all fertilizers should be submitted to an examination, and that statements of their ingredients should be attached to every package.¹

Inspection Fees.—The amount of the charge which a State can lawfully impose for inspection is by the Constitution limited, in the case of foreign commerce, to such sum as is absolutely necessary for execution of its inspection laws; and so long as the charge imposed is of an amount which can reasonably be considered an inspection fee, a Federal court will not determine the question whether it is excessive. In all these matters State legislation is subject to the "revision and control of Congress,"² by whom alone the question is determined whether an inspection charge is excessive. It is, however, the function of any court, before which the question may arise, to determine whether or not a charge imposed by the State under the guise of an inspection law is, in its nature, an inspection fee or a tax;³ and as a guide to such a determination the court will consider not only the amount of the charge, but also the apparent purpose of the enactment, and whether it be to evade the constitutional prohibitions.⁴

FERRIES AND BRIDGES.

A ferry is a public highway, "a continuation of a road," and, so far as concerns the authority of the State and of the United States, does not differ from a toll bridge. "It is a franchise which approaches so near to that of a bridge, that

¹ *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 52 Fed. Rep. 690; *Goodwin v. Caraleigh*

Phosphate Works, 119 N. C. 120; *Merriman v. Knox*, 99 Ala. 93; *Brown v. Adair*, 104 Ala. 652; *Van Meter v. Spurrier*, 94 Ky. 22; *Goulding Fertilizer Co. v. Driver*, 99 Ga.

623. *Contra*, *State of Louisiana v. Lagarde*, 60 Fed. Rep. 186.

² *Turner v. Maryland*, 107 U. S. 38; *Patapsco Guano Co. v. Board of North Carolina*, — U. S. —.

³ *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690.

⁴ *Goodwin v. Caraleigh Phosphate Works*, 119 N. C. 120.

human ingenuity has not, as yet, been able to state any assignable difference between them, except that one includes the right of pontage and the other of passage or ferriage."¹ A State may grant franchises of ferries and bridges, both to cross waters wholly within its limits and waters forming the boundaries between States.²

At the time of the formation of the Constitution and during the earlier periods of constitutional construction, the establishment and regulation of highways, whether within the States or across their boundaries, was a matter pre-eminently of local concern. The roads within a county interested so largely the residents of that county, and affected remoter localities in so much smaller degree, that their control could safely be left to the States and municipalities. With the improvement of transportation this condition disappeared. The local traffic of a single county upon a great highway is now, in most instances, of small importance when compared to the larger interests at a distance. The right of free ferriage at Detroit is probably of much more importance to the great Northwest and Northeast, extending for a thousand miles on each side, than it is to the residents of Detroit and Windsor.

At the same time, in many aspects, ferries and bridges, like turnpikes, still have local interest and importance which give them peculiar standing. Their transportation is essentially local, in most cases being measured by feet, and in comparatively few cases exceeding a mile. In many instances the traffic concerned is still almost entirely within the neighborhood. Along the thousands of miles of waterway within the country, such transportation is performed

¹ Charles River Bridge v. Warren Bridge, 11 Pet. 420; Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204, 218. Tex. 420, 492; Chiapella v. Brown, 14 La. Ann. 185; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 580.

² Cooley, Const. Lim. (6th ed.), p. 781; Adams v. Ulmer, 39 Atl. Rep. 347; Challiss v. Davis, 56 Mo. 25; People v. Babcock, 11 Wend. 586; Tugwell v. Eagle Pass Ferry Co., 74 Ind. 387. Conf. Kerby v. Lewis, 6 Upp. Can. Q. B. (O. S.) 207; Regina v. Davenport, 16 Upp. Can. Q. B. 411; City of Madison v. Abbott, 118 Ind. 387.

under circumstances so different that it has always been considered as properly subject to State jurisdiction to a considerable extent.¹

Under the early doctrines it seems to have been considered that the subject was not within the Federal jurisdiction,² but should be controlled by the States alone under their police power, even as concerned transportation over streams which formed the boundaries between States; and in the exercise of this authority the States discriminated in favor of their own citizens,³ regulated charges for interstate transportation,⁴ and in many other ways exercised a greater control than over transportation of a more general nature.

The right of ferriage which a State grants upon a boundary stream, it is said, is in respect of the landing and not of the water.⁵ The right of navigation does not authorize appropriation of the banks of the river, or the receipt of tolls for transporting passengers across it.⁶ The franchise granted by a single State to conduct a ferry may be less valuable for want of landing on the other side of the water, but it is a valid franchise nevertheless.⁷ The right of ferriage, being within the power of a State to grant or withhold, may be given as an exclusive right to a single individual, and there are many cases of exclusive grants of ferry privileges over streams which formed boundaries between States and upon public navigable waters.⁸

¹ *City of Madison v. Abbott*, 118 Ind. 337. *Black*, 603; *Weld v. Chapman*, 2 Iowa, 524.

² *United States v. James Morrison*, Newb. 241; *United States v. William Pope*, Newb. 265. ⁶ *Mills v. County of St. Claire*, 2 Gil. 197.

³ *Conway v. Taylor's Executor*, 1 Black, 603; *Fanning v. Gregoire*, 16 How. 524; *City of Newport v. Taylor's Executors*, 16 B. Mon. 699. ⁷ *Columbia Delaware Bridge Co. v. Geisse*, 9 Vroom, 89; *Conway v. Taylor's Executor*, 1 Black, 603.

⁴ *State v. Freeholders of Hudson County*, 23 N. J. L. 206; *Freeholders of Hudson County v. State*, 24 N. J. L. 718. ⁸ *Conway v. Taylor's Executor*, 1 Black, 603; *City of Newport v. Taylor's Executors*, 16 B. Mon. 699; *Fanning v. Gregoire*, 16 How. 524; *Marshall v. Grimes*, 41 Miss. 27; *United States ex rel. Jones v. Fanning*, 1 Morris (Iowa), 343; *Phillips v. Town*

⁵ *Conway v. Taylor's Executor*, 1

Where two States granted different persons exclusive rights of ferriage at the same place, interesting questions have arisen. In *Conway v. Taylor's Executor*¹ the defendant in error claimed the exclusive right of ferriage across the Ohio river, opposite the city of Newport, by virtue of a grant from the State of Kentucky. The plaintiff in error was master of a vessel enrolled under the United States laws for the coasting trade, and having a ferry license under the laws of Ohio. It was held by the Supreme Court of Kentucky that, under these circumstances, the vessel navigating under the Ohio laws was authorized to land in Kentucky and to discharge passengers and freight, but that it had no authority to receive passengers and freight on the Kentucky side, or to do any business from that shore. This decision was upheld by the Supreme Court of the United States. "The franchise of ferriage," Mr. Justice Swayne said, "was confined to transit from the shore of the State. The same rights which Kentucky claimed, it also conceded to Ohio. The exclusive franchise granted to the defendants in error, threw no obstacle in the way of transit from the States lying upon the other side of the Ohio River, for that was regulated solely by their laws. Undoubtedly, the States might in conferring ferry franchises, so infringe the commercial power of the nation that it would be the duty of the court to set them aside, but in the case at bar the regulation was not considered as of that character."²

With the progress of constitutional construction, however, the important relation which ferries and bridges bear to in-

of Bloomington, 1 Greene (Iowa), 496; Burlington, etc. Ferry Co. v. Davis, 48 Iowa, 133; Mayor, etc. of New York v. Independent Steamboat Co., 106 N. Y. 1, 28; Midland Terminal & Ferry Co. v. Wilson, 1 Stew. (28 N. J. Eq.) 587; Chilvers v. People, 11 Mich. 43; People v. Babcock, 11 Wend. 587; Columbia Delaware Bridge Co. v. Geisse, 9 Vroom,

39; St. Louis v. Waterloo, etc. Ferry Co., 14 Mo. App. 216; Challiss v. Davis, 56 Mo. 25; Nixon v. Reid, 8 S. Dak. 507; Carroll v. Campbell, 110 Mo. 557; s. c., 108 Mo. 550.

¹ 1 Black, 603. See *Newport v. Taylor's Executors*, 16 B. Mon. 699.

² See *Challiss v. Davis*, 56 Mo. 25; *Weld v. Chapman*, 2 Iowa, 524.

terstate transportation is recognized. "If . . . interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State lines, regardless of the distance from which it comes, or to which it is bound before or after crossing such State line. In other words, if it be commerce to send goods from Cincinnati in Ohio, to Lexington in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington."¹ The act of leaving or of taking passengers and freight out of a State is as much a part of interstate commerce as the act of entering and discharging, and the one as much as the other is beyond the power of the States to regulate or prohibit.² The distinction which it was sought to make between the act of entering and the act of leaving has therefore been abandoned.³ Ferriage across State lines, like all other interstate transportation, is within the protection of the Constitution. It does not depend alone upon the pleasure of the States, but may be authorized by Congress, notwithstanding the objection of the State.⁴

Highways.—The States have power to construct and maintain highways, to regulate their use, and to collect compensation for the facilities provided by keeping them in repair for the use of vehicles.⁵ In most cases these powers have been exercised through corporations authorized to construct highways and to charge for their use.

¹ Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204.

² Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

³ Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 211.

⁴ Texas, etc. Ry. Co. v. Baton Rouge, 36 Fed. Rep. 845.

⁵ Bogart v. Ohio, Ct. Com. Pl. Hamilton Co., 2 Int. Com. Rep. 297.

CHAPTER VI.

REGULATION OF CARRIERS.

It has been found difficult to determine the municipal law which is the source of many of the rights and duties of an interstate carrier. Within this field of doubtful jurisdiction is the duty to receive goods or passengers for transportation to other States, to exercise care in carriage, to deliver freight to the consignee, and the right to demand reasonable compensation. These and many other subjects are of more than local importance, and are to a very limited extent the subject of Federal legislation. Where, then, is the law found by which these rights and duties are measured and determined?

Extent of Positive Federal Law.—Legislation by Congress on the subject of commerce covers but a small part of this large field. With reference to navigation the maritime law supplements the statutes, but outside its particular province the common or civil law must be applied as part of the Federal jurisprudence, or the conclusion is inevitable that, in many matters of national importance, interstate and foreign commerce is without the protection or control of any Federal law. In one case, to avoid this conclusion, it was held that there is a Federal common law, and it was said that this law would sustain an action for discrimination and excessive charges for interstate transportation before the Interstate Commerce Act of February 4, 1887.¹ The weight of authority, however, supports the proposition that there is no Federal common law.²

¹ *Murray v. Chicago, etc. R. Co.*, U. S. 183; *Swift v. Philadelphia, etc. R. Co.*, 58 Fed. Rep. 858, 64 Fed. Rep. 24. See *Kinnavey v. Terminal Ry. Co.*, 81 Fed. Rep. 802.

² *Smith v. Alabama*, 124 U. S. 465; *Iowa*, 112. *Chicago, etc. R. Co. v. Solan*, 169

Extent of State Jurisdiction.—The general rule is well established, that, in the absence of congressional legislation, the States may regulate local matters indirectly affecting commerce, but that they may not act directly upon commerce in matters of national interest or which admit of uniform regulation. In these respects the silence of Congress is equivalent to a declaration of its will that commerce shall be free and unrestricted.

It has been sought to solve the problem by regarding State law controlling the rights and duties of carriers as local regulations governing domestic contracts. A carrier doing business within a State, it is said, may be required by the State to enter into contracts for carriage, and the law of the place would in many respects enter into these contracts as into all others made within its territory, as implied agreements. Upon this theory State jurisdiction would cease when the contract was made, and thereafter the rights and duties of the parties would be determined by the contract alone. The State law would not operate directly upon commerce in matters of a national character, but the same result would be attained through State regulation of the contract.

Applying this doctrine, it has been held that, where a contract for interstate shipment specifies the rates to be paid, an action cannot be maintained upon the State common law to recover the excess of such charge above a reasonable amount,¹ or for discrimination;² but that where the rate is not specified, the State law implies an agreement to pay a reasonable sum.³

This theory is probably not in accord with the decisions of the Supreme Court which define the limits of those local

¹ *Swift v. Philadelphia, etc. R. R. Co.*, 58 Fed. Rep. 858. *Atchison, etc. R. Co.*, 15 Fed. Rep. 650; *McGwigan v. Railway Co.*, 95

² *Gatton v. Chicago, R. I. & P. R. Co.*, 95 Iowa, 112; *Wright v. Barry (Tex. Civ. App.)*, 45 S. W. Rep. 814.

Charlotte, etc. R. R. Co., 96 N. C. 1; ³ *Swift v. Philadelphia, etc. R. R. Co.*, 64 Fed. Rep. 59.

Cowden v. Pacific Coast S. S. Co., 94 Cal. 470; *Denver, etc. R. Co. v.*

regulations which are within State jurisdiction. Rights and duties are not local which do not terminate at State lines, but follow the carrier into other jurisdictions until performance of the contract is complete.

The Solution of the Problem.—Amid these apparent contradictions the one established fact is that the field in question is actually governed by State law. The conclusion necessarily follows, that the rule of construction which prevents State regulation of interstate and foreign commerce in matters of national importance is not as absolute and extensive as it has been announced, but that it is subject to very important modification. The silence of Congress does not always exclude State regulation, but throughout a wide field is equivalent to a declaration that, until superseded by Congress, State law may control.

"This power of regulation," the Supreme Court has said, "may be exercised without legislation as well as with it. By refraining from action Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade."¹

In *Smith v. Alabama*² the subject was further considered by the Supreme Court, and it was held that State laws, regulating relative rights and duties of persons within the jurisdiction of the State, are effective upon interstate carriers.³

"This general system of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each state,

¹ Hall v. De Cuir, 95 U. S. 485, 490. Co. v. Phenix Insurance Co., 139

² 124 U. S. 465.

U. S. 397, 489; Davis v. Chicago Ry.

³ See also *Liverpool, etc. Steam Co.*, 98 Wis. 470.

or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several states in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each state that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication. . . . But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly sup-

plies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject."

The Duty to Receive, Carry and Deliver.—It is the State law which in most part defines the obligation of common carriers, imposes the duty to accept goods or passengers for transportation, and gives the carrier the right to demand reasonable compensation therefor.¹

The Federal statutes recognize these rights in the case of railways,² but even without this authority the carrier has these rights under State law. Under the rule of the Federal courts, receipt of merchandise for transportation establishes an implied contract between the carrier and shipper for safe carriage over its own line and delivery to the consignee, or to the next carrier beyond, within a reasonable time.³ The undertaking to transport goods necessarily includes the duty to deliver them to the person designated by the terms of the shipment, or to his order at the place of destination. There are no conditions which will release the carrier from this duty, except such as would also release him from the safe carriage of goods, and no obligation is more strictly enforced.⁴

¹ *Rae v. Grand Trunk Ry. Co.*, 14 Fed. Rep. 401; *Iowa v. Chicago, etc. Ry. Co.*, 33 Fed. Rep. 891; *Connell v. Telegraph Co.*, 108 Mo. 459; *Chicago, etc. Ry. Co. v. Wolcott*, 141 Ind. 287; *Railroad Co. v. Osborne*, 52 Fed. Rep. 912; *Kemp v. Telegraph Co.*, 28 Neb. 661; *Telegraph Co. v. Powell*, 94 Va. 268.

² U. S. Rev. Stat., tit. LXIV, sec. 5258; Act to regulate commerce, March 4, 1887, and amendments, see *post*.

³ *Myrick v. Railway Co.*, 107 U. S. 102; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 818; *Deming v. Norfolk & Western R. R. Co.*, 21 Fed. Rep. 25; *Empire Co. v. Wallace*, 18 P. F. Smith, 302; *Kemp v. Telegraph Co.*, 28 Neb. 661.

⁴ *North Pennsylvania R. R. Co. v. Commercial Bank*, 128 U. S. 727; *Covington Stock Yards v. Keith*, 139 U. S. 123, 135; *Forbes v. Boston & Lowell R. Co.*, 133 Mass. 154.

The Contract of Carriage.—In the absence of Federal legislation, the validity and effect of the contract between a shipper and carrier for transportation from one State to another is determined by State law, and in most cases this is the law of the State in which the contract is made and where transportation begins.¹ Thus, the validity of a stipulation in a bill of lading, limiting the carrier's liability, depends upon the law of the State of contract. The carrier's contract does not vary with each jurisdiction in which it may be partly performed, for the service rendered is single, the transportation performed and the liability assumed being the measure, on one side, by which the compensation to be paid on the other side is determined.²

State Acts Enforcing or Modifying the Common Law.—In some instances it has been held that State laws prohibiting the limitation of liability by a carrier do not relate to interstate transportation.³ The balance of authority, however, indicates that the validity of such a provision is usually determined by the law of the place of contract. Where by that law the stipulation limiting liability is valid, the contract will ordinarily be upheld,⁴ even in another State where such a stipulation is not permitted.⁵ And, on the other hand, where by the law of the place of contract a stipulation is prohibited, it affects the performance of the contract in other States.⁶

¹ *Brookway v. American Express Co.*, 168 Mass. 357; *Brookway v. American Express Co.* (Mass., 1898), 50 N. E. Rep. 626; *Myrick v. Railroad Co.*, 107 U. S. 103, 109.

² *Liverpool, etc. Steam Co. v. Phoenix Ins. Co.*, 189 U. S. 457; *The Henry B. Hyde*, 89 Fed. Rep. 681; *Ohio, etc. Ry. Co. v. Tabor*, 98 Ky. 508; *McDaniel v. Railway Co.*, 24 Iowa, 412; *Meuer v. Chicago, M. & St. P. Ry. Co.* (S. D.), 75 N. W. Rep. 828.

³ *Railroad Co. v. Sherwood*, 84 Tex. 135; *Wright v. Howe*, 24 S. W. Rep. 314; *Missouri, etc. R. Co. v. Interna-*

tional Ins. Co., 84 Tex. 125; *Otis Co. v. Missouri Pacific Co.*, 112 Mo. 622.

⁴ *Hart v. Railway Co.*, 69 Iowa, 485.

⁵ *Thomas v. Wabash Ry. Co.*, 63 Fed. Rep. 200; *Hazel v. Railway Co.*, 89 Iowa, 477. *Conf. Telegraph Co. v. Eubank* (Ky.), 38 S. W. Rep. 1068; *Chicago, etc. R. Co. v. Gardiner*, 51 Neb. 70; *Telegraph Co. v. Burgess* (Tex. Civ. App.), 43 S. W. Rep. 1088; *North Packing, etc. Co. v. Western Union Tel. Co.*, 70 Ill. App. 275.

⁶ *Brockway v. American Express Co.*, 168 Mass. 257; *Davis v. Rail-*

"The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of the State or by the Constitution or laws of the United States."¹ A State may prevent a carrier from stipulating not to be answerable for its own negligence,² or where its contract extends beyond its terminus for that of connecting lines;³ but where it contracts only for transportation upon its own line, it is probable that a State law preventing similar limitation upon its responsibility, as applied to interstate carriers, would be invalid as a regulation of interstate commerce.⁴

The same rule sustains statutes invalidating stipulations by which carriers seek to establish conditions precedent to suit, as by requiring notice or limiting the time within which an action may be brought upon their contracts.⁵

A State may also forbid the sale of railway tickets by per-

way Co., 98 Wis. 470; *Liverpool, etc. Steam Co. v. Insurance Co.*, 129 U. S. 397; *Fonseca v. Steamship Co.*, 153 Mass. 553; *Fairchild v. Railway Co.*, 148 Pa. St. 527; *St. Joseph, etc. Ry. Co. v. Palmer*, 38 Neb. 463. See *Solan v. C., M. & St. P. Ry. Co.*, 95 Iowa, 260.

¹ *C., M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133. See *Houston, etc. R. Co. v. Davis*, 11 Tex. Civ. App. 24; *Houston, etc. Ry. Co. v. Williams*, 31 S. W. Rep. 556.

² *Railway Co. v. Lockwood*, 17 Wall. 357; *Voight v. Baltimore, etc.*

R. Co., 79 Fed. Rep. 561; *Meuer v. Chicago, M. & St. P. Ry. Co. (S. D.)*, 75 N. W. Rep. 823.

³ *McCann v. Eddy*, 138 Mo. 59.

⁴ *Richmond, etc. R. R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 92 Va. 670; *McCann v. Eddy*, 138 Mo. 59; *Texas, etc. R. Co. v. Adams*, 78 Tex. 372.

⁵ *Armstrong v. Galveston, H. & S. A. Ry. Co.*, 5 Int. Com. Rep. 247; *Armstrong v. Galveston, H. & S. A. Ry. Co.*, 46 S. W. Rep. 33, reversing s. c., 43 S. W. Rep. 614; *Reeves v. Texas & P. Ry. Co.*, 11 Tex. Civ.

sons without written authority from the railway company,¹ but may not, by regulations of the contract, indirectly regulate interstate commerce.²

A carrier operating within a particular State is answerable to the laws of that State for acts of nonfeasance or misfeasance committed within its limits. "If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon a person or passenger brought from another state,"³ or fails in his duty to preserve order upon his vehicles,⁴ a right of action for the consequent damage is given by the local law. It is the law of the State which declares that the common carrier owes the duty of care, which fixes the rules according to which, under varying conditions, his conduct should be measured and judged, and what shall constitute that negligence for which he shall be responsible.

Right of Action for Personal Injuries.—In the absence of Federal legislation the States may give a right of action for death caused upon a vessel engaged in interstate or foreign commerce, where the accident happens within the boundary of the State,⁵ but it has no such power where the death is caused upon the high seas beyond, although the home port of the vessel may be within its limits.⁶

App. 514; *Missouri, K. & T. Ry. Co. v. Withers*, 40 S. W. Rep. 1073; *Galveston, H. & S. A. R. Co. v. Herring* (Tex. Civ. App.), 86 S. W. Rep. 129; *Ohio, etc. Ry. Co. v. Tabor*, 98 Ky. 503; *Gulf, etc. R. Co. v. Eddins*, 7 Tex. Civ. App. 116; *Galveston, etc. R. Co. v. Johnson* (Tex. Civ. App.), 29 S. W. Rep. 428; *Western Union Tel. Co. v. Burgess* (Tex. Civ. App.), 43 S. W. Rep. 1033; *Burgess v. Western Union Tel. Co. (Tex.)*, 46 S. W. Rep. 794.

¹ *State v. Corbett*, 57 Minn. 345; *Fry v. State*, 63 Ind. 552; *Commonwealth v. Wilson*, 14 Phila. 384.

² *Post*, p. 133.

³ *Smith v. Alabama*, 124 U. S. 465, 476.

⁴ *Heard v. Georgia R. Co.*, 2 Int. Com. Rep. 508.

⁵ *Sherlock v. Alling*, 98 U. S. 99; *Bradley, Adm'r, v. Northern Transportation Co.*, 15 Ohio St. 553; *Bigelow v. Nickerson*, 70 Fed. Rep. 113; *In re Humboldt Lumber Manufacturers' Ass'n*, 60 Fed. Rep. 428, 73 Fed. Rep. 239; *The Manhasset*, 18 Fed. Rep. 918. *Conf. Butler v. Boston Steamship Co.*, 130 U. S. 527.

⁶ *The E. B. Ward, Jr.*, 16 Fed. Rep. 255.

The State statute of limitations upon such action attaches to the liability itself, is not a part of the remedy, and may be enforced in a Federal court,¹ or in admiralty, where the injury occurs upon navigable waters.² A State act modifying the fellow-servant rule in actions by employees against railroad companies for personal injury is valid as applied to railroads engaged in interstate transportation.³

Actions for Damages for Fire.—A railroad company operating within a State is subject to its police regulations concerning the communication of fire from locomotives,⁴ and such regulations may determine the rules of evidence by which the communication of fire may be proved or a *prima facie* case made, or may make the railroad liable for fire communicated from its locomotives, irrespective of any question of negligence upon its part.⁵

Actions for Importation of Infected Cattle.—Cattle brought during the spring, summer and early fall from portions of the South often communicate to Northern cattle a disease known as Texas or splenic fever, and for this reason many States have excluded Southern cattle from their territory during the period of the year when the disease is contagious, except when transported through the State by railway or steamboat, and have made persons who brought Texas cattle into the State responsible for damage which might result from their communication of Texas fever to domestic cattle. These laws were upheld in Missouri,⁶ and also in Illi-

¹ The Harrisburg, 119 U. S. 199.

² In re Petition of Humboldt Lumber Manufacturers' Ass'n, 60 Fed. Rep. 428.

³ Peirce v. Van Dusen, 78 Fed. Rep. 693.

⁴ Von Steuben v. Central Ry. Co., 4 Penn. Dis. Rep. 153.

⁵ St. Louis, etc. R. Co. v. Mathews, 165 U. S. 1; Smith v. Boston &

Maine Ry. Co., 68 N. H. 25; Mo-
Candleless v. Richmond & Danville
Ry. Co., 38 S. C. 108; Hunter v. Co-
lumbia, etc. R. Co., 41 S. C. 86; Lip-
feld v. Charlotte, etc. R. Co., 41
S. C. 285; Mobile Ina. Co. v. Colum-
bia, etc. R. Co., 41 S. C. 408.

⁶ Husen v. Hannibal, etc. R. R.
Co., 60 Mo. 226; Wilson v. Kansas
City, etc. R. R. Co., 60 Mo. 184.

nois, where a similar statute was in force.¹ The Supreme Court of the United States, in *Railroad Co. v. Husen*, adopted a different view. The action was brought upon the statute to recover damages for the communication of disease to plaintiff's cattle by Southern cattle which had been brought into the State by the defendant. The Supreme Court did not, however, limit its examination to the portion of the statute upon which the case arose, but, taking the statute as a whole, found that its object was to obstruct interstate commerce, and to discriminate against the property or citizens of other States. It forbade the transportation of Southern cattle into Missouri between the 1st of March and the 1st of November in each year, whether the cattle were diseased or not, and made carriers transporting them into or through the State responsible for damages resulting from Texas fever communicated by such cattle. These restrictions, the court said, extended beyond the danger to be apprehended, and could not be justified by the necessities of self-defense. The act as a whole was therefore unconstitutional, and a railway company which transported Southern cattle into the State of Missouri was not thereby made responsible for damages which might result from their communication of disease.²

Following this decision, it was held that to recover in such cases it was necessary to establish negligence on the part of the defendant, and to do this it was not sufficient to show knowledge on his part that the cattle in his possession had come from infected districts of the South, but it was necessary to show knowledge that the cattle were in fact diseased.³

It was soon found, however, that this rule did not meet the necessities of the situation. It is now generally admitted that all cattle brought during the spring and summer months from the low lands of the South are liable to communicate

¹ *Yeazel v. Alexander*, 58 Ill. 254; *Somerville v. Marks*, 58 Ill. 871; *Chicago, etc. R. Co. v. Gasaway*, 71 Ill. 570. ² *Railroad Co. v. Husen*, 95 U. S. 465; *Salzenstein v. Mavis*, 91 Ill. 391; *Jarvis v. Riffin*, 94 Ill. 164. ³ *Bradford v. Floyd*, 80 Mo. 207; *Railway Co. v. Finley*, 88 Kan. 550.

Texas fever, and that such cold weather as is usual in the winter, north of the southern boundary of Missouri and Kansas, destroys the virus of the disease and removes the danger of infection.

For this reason a statute was passed in Kansas which created a *prima facie* presumption that cattle brought from infected districts during certain periods of the year were diseased, and that the owner or person bringing them into the State, or having them in possession, was affected with knowledge of their condition.¹

In 1888, when the subject again came under consideration in *Kimmish v. Ball*,² the Supreme Court took judicial notice of the existing situation, and sustained a statute of Iowa which made persons who permitted Southern cattle to run at large within the State during the warm season liable for resulting damage. The statute involved in this case, as in the *Husen* case, excluded all Southern cattle from the State for a large part of the year; but in the interval since the earlier decision, the nature of the trouble and the extent of the threatening danger had become more widely known. The court said no attempt was made in the *Husen* case to show that all cattle from the malarial districts of the South were infected, or that so many were infected as to make a separation impossible. Had such proof been given, a different question would have been presented. Without passing upon the clause which forbade the introduction of Southern cattle into the State during certain periods of the year,—a clause upon whose validity the court intended to throw no doubt,—the provision upon which the action was brought was sustained.

In *Grimes v. Eddy*³ the Supreme Court of Missouri held that a State could authorize the recovery of damages on account of disease communicated from Texas cattle negligently permitted to run at large while being transported

¹ *Patee v. Adams*, 37 Kan. 183; ² 129 U. S. 217.
Rouse v. Youard, 1 Kan. App. 270. ³ 126 Mo. 168.

through the State; while it could not forbid such transportation, it could provide regulations to prevent the spread of disease.

The discussion in this case, however, went beyond the point decided, and indicates a re-establishment in that court of the law as it existed before the decision of the United States Supreme Court in the *Husen* case.

The right of action given is for negligence.¹ A carrier or other person knowingly bringing infected cattle into the State, and permitting them to run at large and communicate disease to native cattle, would be responsible at common law for resulting injury. Under existing circumstances it is possible for a State to provide that, in actions to recover damages for communication of Texas fever, proof that the cattle which are claimed to have communicated disease were brought from south of the thirty-seventh parallel of latitude shall be taken as *prima facie* evidence that they were, during the warm period of the year, capable of communicating fever, and that the person in charge of them had knowledge of this fact. Such a statute establishes no new liability, but alters the proof by which liability may be shown. It may be doubted whether a statute which went further than this, and attempted to impose a liability where the defendant had no knowledge or means of knowledge that the cattle in his possession were capable of communicating disease, would be constitutional. Upon this subject the Supreme Court of the United States in the *Haber* case refuse to express an opinion.

It has sometimes been urged that compliance with the Animal Industry Act² and with the regulations of the Secretary of Agriculture would furnish a complete defense for claims for damages of this character. The subject was considered in *Missouri, etc. R. R. Co. v. Haber*,³ and it was held that the purpose of the Federal government in making these regula-

¹ *Grimes v. Eddy*, 126 Mo. 168;
Rouse v. Youard, 1 Kan. App. 270;
Selvege v. St. Louis, etc. Ry. Co.,
185 Mo. 163.

² *Post*, p. 175.

³ 169 U. S. 613, 56 Kan. 694.

tions was to prevent the spread of disease from one State to another, not to deprive any person of the right to recover damages for injury inflicted on his cattle through contact with diseased cattle. The carrier transporting into a State cattle capable of communicating disease does so, therefore, subject to such liability as may arise under any law of the State which does not unnecessarily burden or prohibit interstate commerce.

Regulation of Interstate Transportation.—The Civil Rights Laws of the States are inapplicable to interstate transportation,¹ and under some circumstances such statutes may not apply to interstate carriers, even in the case of transportation performed within a single State.

Thus, in *Hall v. De Cuir* it was held that a State could not require interstate carriers to give to domestic passengers equal rights in all parts of the conveyance. There is no doubt that such a statute may operate upon that transportation which begins and ends within a State;² but it cannot compel interstate passengers in any portion of their journey to share their accommodations with passengers of another race.³

In Texas it was assumed that such statutes would apply to that part of an interstate journey performed within the State,⁴ but this assumption is contrary to the current of authority.⁵

Upon the same principle it has been held that a State cannot prohibit interstate transportation of liquors at night by other than regular passengers, or freight steamers, or railroad

¹ *Brown v. Memphis, etc. Ry. Co.*, 5 Fed. Rep. 499; *Carrey v. Spencer*, 86 N. Y. Supp. 886, 72 N. Y. St. Rep. 108; *State ex rel. Abbott v. Hicks*, 44 La. Ann. 770; *Anderson v. L. & N. Ry. Co.*, 62 Fed. Rep. 46.

² *Plessey v. Ferguson*, 163 U. S. 537.

³ *Hall v. De Cuir*, 95 U. S. 485, re-

versing *De Cuir v. Benson*, 27 La. Ann. 1.

⁴ *Pullman's Car Co. v. Cain* (Tex. Civ. App.), 40 S. W. Rep. 220.

⁵ *Louisville, etc. Ry. Co. v. Mississippi*, 133 U. S. 587; *Louisville, etc. Ry. Co. v. State*, 66 Miss. 662.

cars,¹ nor require railroad companies to furnish double-deck cars for the interstate transportation of cattle.²

Transportation of Animals.—Transportation of animals is the subject of several Federal statutes.³ The transportation of live-stock affected with contagious diseases from State to State, or from or to a foreign country, is prohibited.⁴ The Secretary of Agriculture is required to cause inspection of all cattle intended, or whose meat is intended, for exportation. Cattle, sheep and hogs which are to be carried from one State to another, and whose meat is to be transported and sold for human consumption in any State or Territory, are also to be inspected under the direction of the Secretary of Agriculture.

The Secretary is authorized to examine vessels carrying cattle from the United States to foreign countries and to prescribe accommodations which vessels shall give as to space, ventilation, fittings, food and water supply, and make such other requirements as he may decide necessary for the safe and proper transportation and humane treatment of such animals.⁵

Exportation of cattle, sheep and swine which are diseased or infected, or which have been exposed to infection within sixty days before exportation, is prohibited. The Secretary of Agriculture is authorized, at the expense of the owner, to quarantine imported animals and to slaughter such as are infected or have been exposed to infection.⁶

The statutes⁷ also provide that no railroad company or

¹ *Jervy v. The Carolina*, 66 Fed. Rep. 1018.

² *Stanley v. Wabash, etc. Ry. Co.*, 100 Mo. 435.

³ Act of March 3, 1891, 26 Stat. L. 1089, Supp. R. S., p. 987. See *post*, p. 338.

⁴ Act of August 30, 1890, 26 Stat. L. 414, Supp. R. S. 794; Act of May 29, 1884, 28 Stat. L. 31, Supp. R. S. 435.

⁵ Act of March 3, 1891, 26 Stat. L. 833, Supp. R. S. 908.

⁶ Act of August 30, 1890, 26 Stat. L. 414, Supp. R. S. 794.

⁷ Act of March 3, 1873, U. S. Rev. Stat., secs. 4886, 4890; *United States v. Boston, etc. R. Co.*, 15 Fed. Rep. 209; *United States v. Louisville, etc. R. Co.*, 18 Fed. Rep. 460.

vessel transporting animals from one State to another shall confine them for longer than twenty-eight consecutive hours without unloading for rest, water and feed for a period of at least five hours, unless prevented by storm or other accidental causes. This statute has no application to shipments of cattle from point to point wholly within the limits of a single State.¹

It was held by the Supreme Court of Texas that this statute prevents the operation of State acts upon the same subject so far as concerns interstate shipments.²

The statute does not, however, state all the many duties assumed by a carrier of live-stock,³ but rather states a minimum decree of care and attention below which an interstate carrier may not fall. In Massachusetts the State has substantially adopted the Federal statute⁴ upon the subject, and has provided additional means for its enforcement, and it is considered by the Supreme Court of that State that this regulation may apply to that part of an interstate journey which is within the State.⁵ The act does not impose duties upon carriers beyond the limits of Massachusetts, but recognizing that the care which an animal needs depends upon the care which it has received, measures the carrier's conduct in part by what has been done outside the Commonwealth under such circumstances that corporations within the Commonwealth would have knowledge of it, or could easily ascertain it; and then makes it the duty of a railroad corporation to ascertain whether animals which it receives from connecting roads for transportation can be continuously confined without cruelty until their destination is reached. The statute was therefore sustained on the ground that its operation was confined to the State.

¹ *United States v. East Tennessee, etc. Ry. Co.*, 13 Fed. Rep. 642; *Thompson*, 71 Ill. 434; *Cragin v. Davis v. Texas, etc. Ry. Co.*, 13 Tex. N. Y. C. R. Co., 51 N. Y. 61. Civ. App. 427.

⁴ Pub. St., ch. 207; secs. 55, 58.

² *Gulf, etc. Ry. Co. v. Gray*, 87 Tex. 812, overruling *s. c.*, 24 S. W. Rep. 837.

⁵ *Hendrick v. Boston & A. Ry. Co. (Mass.)*, 48 N. E. Rep. 835. Conf. *Comer v. Columbia N. & L. R. Co.*

³ Wood on Railroads (2d ed.), (So. Car.), 29 S. E. Rep. 637.

A State law designating the places or wharves at which stock shall be landed from steamboats is not a regulation of commerce, and can be enforced with reference to interstate shipments.¹ And when a railroad takes freight for transportation into a State it is its duty to ascertain, and in its contract to conform to, the legitimate police regulations of the State.²

The Right to the Benefit of State Laws.—In the conduct of interstate commerce persons are subject to the obligation of State laws securing personal and property rights, and are entitled to their protection. A statute abrogating all remedies for the wrongful exclusion of a passenger from a railway car is unconstitutional, so far as it relates to railroads operating between two or more States.³ "Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains."⁴ They are entitled to recourse to the State courts to protect their rights, and conversely are subject to the process of those courts while within their jurisdiction.⁵ So a State cannot refuse to permit the vendor of property imported in accordance with Federal law to recover the purchase price of that property.⁶ The obligation of a telegraph company to exercise diligence in transmitting and delivering, within the State, a telegram received from another State, is a common-law duty which a telegraph company, like other carriers, owes to senders, and a State law is valid which imposes a penalty for its violation.⁷

¹ State ex rel. Belden v. Fagan, 22 La. Ann. 545. See Slaughter-House Cases, 16 Wall. 36. den, 55 Fed. Rep. 503; Landa v. Missouri, etc. R. Co., 129 Mo. 663.

² Hendrick v. B. & A. R. Co., 48 N. E. Rep. 335.

³ Brown v. Railroad Co., 5 Fed. Rep. 492.

⁴ New York, etc. R. R. Co. v. New York, 165 U. S. 628, 632.

⁵ Holyoke, etc. Ice Co. v. Amb-

⁶ Durkee v. Moses (N. H.), 23 Atl. Rep. 798; Doherty v. Cotter (N. H.), 38 Atl. Rep. 499; Barrett v. Delano (Me.), 14 Atl. Rep. 288. Conf. McGuinness v. Bligh, 11 R. I. 94. Contra, Meservey v. Gray, 55 Me. 540; Knowlton v. Doherty, 87 Me. 518. ⁷ Telegraph Co. v. Fenton, 52 Ind.

Appointment of Resident Agents.—A State law requiring that a foreign corporation which locates or does domestic business in a State shall have a known place of business and an authorized agent upon whom process may be served has been held a legitimate exercise of the police power of the State,¹ but no requirement may be made a condition of the right to engage in interstate commerce.²

Sunday Laws.—The courts have in recent years gone far to sustain the validity of Sunday laws as applied to interstate commerce. Under earlier decisions it was held that such State laws could have no application to the sale of liquors in original packages;³ that a State could not prohibit the running of interstate trains,⁴ nor the carriage of express matter through the State on Sunday.⁵

More recent cases have, however, upheld these laws. Statutes prohibiting labor on Sunday are rules of civil conduct, applicable to all persons within the State on that day. It is true that the effect of such laws amounts, during the time and to the extent that they operate, to a prohibition of interstate and foreign commerce, but the same may be said of a quarantine law which interrupts transportation for days or possibly for weeks, and extends to and operates upon ves-

1; *Telegraph Co. v. Tyler*, 90 Va. 297; *Telegraph Co. v. Bright*, 90 Va. 778; *Telegraph Co. v. James*, 90 Ga. 254; *Telegraph Co. v. Bates*, 98 Ga. 352; *Telegraph Co. v. Lark*, 95 Ga. 806. Conf., however, *Rogers v. Telegraph Co.*, 122 Ind. 395.

¹ *Stockton v. Baltimore, etc. R. Co.*, 32 Fed. Rep. 9, 14; *Fritts v. Palmer*, 132 U. S. 232; *Telegraph Co. v. Telegraph Co.*, 67 Ala. 26.

² *Fritts v. Palmer*, 132 U. S. 232; *Reed v. Walker*, 2 Tex. Civ. App. 92; *Gunn v. White Sewing Machine Co.*, 57 Ark. 24; *Lyon, Thomas & Co. v. Reading, etc. Co.*, 21 S. W. Rep. 800; *American Starch Co. v.*

Bateman, 22 S. W. Rep. 771; *Packet Co. v. James*, 32 Fed. Rep. 21; *Singer Mfg. Co. v. Hardee*, 4 N. M. 175; *List v. Commonwealth*, 118 Pa. St. 322. Conf. *Western Paper Bag Co. v. Johnson*, 38 S. W. Rep. 364; *Huffman v. Western Mortgage, etc. Co.*, 36 S. W. Rep. 306; *Barron v. Burnside*, 121 U. S. 183.

³ *Bode v. State*, 7 Gill (Md.), 326.

⁴ *Commonwealth v. Chesapeake & Ohio R. Co.*, 3 Int. Com. Rep. 396; *Norfolk & Western R. Co. v. Commonwealth*, 88 Va. 95.

⁵ *Dinsmore v. The Board*, 12 Abb. N. C. 436; *Adams Express Co. v. Board*, 65 How. Pr. 72.

sels, railway cars, officers, crew and passengers. Few State laws which operate directly on domestic commerce are without direct effect upon interstate commerce, but they are not for this reason alone invalid. The question in every case is whether the police power of the State obstructs foreign or interstate commerce beyond the necessity for its exercise.

In its general police jurisdiction a State may prohibit the operation on Sunday of freight trains, whether engaged in interstate business or not;¹ may punish any person who labors in transportation of interstate freight on Sunday,² and may prohibit the running of empty freight trains.³ In Indiana, also, these laws have been sustained, and it appears to be held that the State may prohibit interstate carriers from doing domestic business on Sunday.⁴

Control of Right of Way.—A State may require a carrier to record conveyances of its right of way;⁵ to fence its road within the State; to stop its trains at railroad crossings; to slacken speed while running in crowded thoroughfares; to light its road within the limits of a village;⁶ to put in switches to connect with railways crossing its tracks;⁷ to provide suitable accommodations at stations; to erect bridges and construct grades and crossings in a prescribed manner, and many other things of a kindred nature affecting the comfort, convenience or safety of those who are entitled to look to the State for protection against the wrongful or negligent acts of others.⁸

A State may require a telegraph company doing an inter-

¹ *Hennington v. Georgia*, 163 U. S. 299; *Hennington v. State*, 90 Ga. 396; *State v. Southern Ry.*, 119 N. C. 814.

² *State v. Railroad Co.*, 24 W. Va. 783.

³ *Norfolk & W. R. Co. v. Commonwealth*, 98 Va. 749, overruling 88 Va. 95.

⁴ *Dugan v. State*, 125 Ind. 130; *Dorsey v. State*, 125 Ind. 600.

⁵ *Commonwealth v. Chesapeake & O. Ry. Co.*, 40 S. W. Rep. 250.

⁶ *Village of St. Bernard v. Cleveland, C., C. & St. L. Ry.*, 4 Ohio D. 371.

⁷ *Jacobson v. Wisconsin, M. & P. R. Co. (Minn.)*, 74 N. W. Rep. 893.

⁸ *Stone v. Trust Co.*, 116 U. S. 307, 334; *Railroad Co. v. Fuller*, 17 Wall. 560; *People v. Railroad Co.*, 70 N. Y. 569; *Thorp v. Railroad Co.*, 27 Vt. 140.

state business to place its wires underground; and may make it the duty of every telegraph company to provide sufficient facilities to receive dispatches from and for other telegraph lines, and from or for any individuals, upon payment or tender of its lawful charges.²

Charges upon Telegraph Poles and Wires.—Municipalities within whose streets poles and wires are maintained by telegraph companies may charge for the use of the streets.³ In *St. Louis v. Western Union Telegraph Co.*⁴ a tax of five dollars upon each telegraph or telephone pole standing in a public street or alley was sustained on the ground that although, under its charter, the city had no authority to impose such a tax, this charge was a rental for the use of public property. All that the company could ask, it was said, would be that the charge should be reasonable in amount. This question must be open to determination in the courts.⁵

It has been held that license fees imposed by a municipality upon a telegraph company, greatly in excess of the amount necessary to supervise the lines, are invalid.⁶

In estimating the amount of such charges the city is not limited to the expense of supervision. Remuneration should be in proportion not only to time and outlay, but to responsibility, and a public or private agent who is exposed to loss in case of injury to persons or property may demand higher pay.⁷ This doctrine was applied in *Philadelphia v. Telegraph Co.*,⁸ although in that case the company had paid taxes on the value of the poles and on its gross receipts for the use of the poles.

¹ *Telegraph Co. v. Mayor, etc. of New York*, 88 Fed. Rep. 552; *American Telegraph Co. v. Hess*, 125 N. Y. 641; *American Telegraph Co. v. Hess*, 58 Hun, 610.

² *Connell v. Telegraph Co.*, 108 Mo. 456.

³ *Telegraph Co. v. Baltimore*, 79 Md. 502; *City v. Telegraph Co.*, 167 Pa. St. 406.

⁴ 148 U. S. 92; s. c., 39 Fed. Rep. 59.

⁵ *City v. Postal Tel. Co.*, 67 Hun, 21, 50 N. Y. Supp. 301.

⁶ *Philadelphia v. Western Union Tel. Co.*, 40 Fed. Rep. 615; *Philadelphia v. Western Union Tel. Co.*, 82 Fed. Rep. 797. *Conf. Telegraph Co. v. Richmond*, 78 Fed. Rep. 858.

⁷ *Telegraph Co. v. Philadelphia*, 22 W. N. C. 39.

⁸ 81 Atl. Rep. 628.

Transmission and Delivery of Telegrams.—It has been shown that the obligation of carriers to receive, transport and deliver arises from the laws of the State where the contract is made and transportation begins. The carrier is, however, subject, in each State in which he operates, to local laws. A statute requiring a telegraph company to receive, transmit and deliver messages with due diligence, and imposing a penalty for non-compliance, is a valid exercise of police power.¹ It imposes no duty which the carrier would not owe in the absence of a statute, nor does it embarrass or obstruct free transmission of messages from one State to another. A State may also provide for delivery of messages received within its limits,² but it cannot extend the operation of its laws so as to impose requirements concerning delivery in another State as part of the contract by which they are received.³

Upon these principles recovery of penalties for failure to deliver messages within a reasonable time have been allowed, although the act of negligence occurred without the limits of the State under whose laws the penalty was recovered;⁴ and where the act of negligence was committed partly within and partly without the State;⁵ and where the message was never forwarded from the office within the State;⁶ and where the act of negligence could not be precisely located at all,

¹ *Telegraph Co. v. Hamilton*, 50 Ind. 181; *Telegraph Co. v. Meredith*, 95 Ind. 98; *Telegraph Co. v. Ferris*, 103 Ind. 91; *Telegraph Co. v. Pendleton*, 95 Ind. 12; *Telegraph Co. v. Michelson*, 94 Ga. 496; *Telegraph Co. v. Howell*, 95 Ga. 194.

² *Telegraph Co. v. James*, 163 U. S. 650, 90 Ga. 254; *Telegraph Co. v. Lark*, 95 Ga. 806; *Telegraph Co. v. Bright*, 90 Va. 778; *Telegraph Co. v. Tyler*, 90 Va. 297; *Telegraph Co. v. Fenton*, 52 Ind. 1; *Telegraph Co. v. Bates*, 93 Ga. 352. *Conf. Rogers v. Telegraph Co.*, 123 Ind. 894.

³ *Telegraph Co. v. Pendleton*, 122 U. S. 347; *Connell v. Telegraph Co.*, 108 Mo. 459.

⁴ *Telegraph Co. v. Hamilton*, 50 Ind. 181; *Telegraph Co. v. Pendleton*, 95 Ind. 12; *Telegraph Co. v. Meredith*, 95 Ind. 98; *Telegraph Co. v. Ferris*, 103 Ind. 91.

⁵ *Reed v. Telegraph Co.*, 135 Mo. 661; *Reed v. Telegraph Co.*, 56 Mo. App. 168.

⁶ *Telegraph Co. v. Michelson*, 94 Ga. 496.

the evidence showing merely that the message had not been received at the office of address.¹

In the case of telegraph companies which have taken advantage of the Federal statutes, telegrams between the several departments of the government, their officers and agents, are given priority over all other business.² It has also been held that the order of transmission of telegraph messages may be the subject of local regulation by a State.³

It seems, however, that such statute must be considered a regulation of interstate commerce beyond State jurisdiction. If a law of one State requiring telegraph messages to be sent within a fixed time after their receipt at the sending office could be sustained, a statute could also be sustained which gave precedence to certain classes of messages, such, for instance, as those signed by or addressed to physicians; or relating to State, county or municipal government; or providing that messages of ten words or under should have precedence over longer messages; or that telegraph messages addressed to the agencies of the public press for dissemination of public information should have precedence over all private messages, or adopting any other method of classification. Such legislation, adopted by different States, would effect the confusion which it was the purpose of the commerce clause to prevent.

Transmission of Freight.—The same rule applies to State statutes requiring freight to be forwarded within a certain time after receipt by the carrier. Such laws have been sustained,⁴ and yet they are clearly regulations of commerce which operate beyond the limits of a State. The obligation of a carrier, imposed by the laws of the several States,

¹ *Telegraph Co. v. Howell*, 95 Ga. 194. See *Telegraph Co. v. Mellan*, 45 S. W. Rep. 448.

² U. S. Rev. Stat., sec. 5266.

³ *Butner v. Telegraph Co.*, 2 Okla. 234.

⁴ *Whitehead & Stokes v. Wilmington & N. R. Co.*, 87 N. C. 255; *Branch v. W. & W. R. Co.*, 77 N. C. 347; *Bagg v. Wilmington, etc. R. Co.*, 109 N. C. 279.

is undoubtedly an obligation to receive and to transport within a reasonable time; but the question what is the measure of a reasonable time, like the standard for determination of reasonableness of rates, depends upon matters beyond the control of any single State. If North Carolina could give the right of way to freight which had been held four days, South Carolina might give it to perishable freight. The result would be a conflict of regulations, under which interstate transportation could not be effectively performed.

In some cases State statutes requiring the delivery of freight upon the tender of charges stated in the bill of lading have been sustained as applied to goods received from other States.¹

State regulations upon this subject are now superseded by the provision of the interstate commerce law prohibiting carriers from collecting any greater or less compensation than specified in their schedule of rates.²

State Regulation Affecting Passenger Tickets.—A State may forbid the sale of tickets for interstate journeys by any person not having written authority from the railway company.³ A State may not, by regulations directly affecting contracts of carriage, indirectly regulate interstate rates, and for this reason statutes requiring the sale of mileage books

¹ *Gulf, etc. R. R. Co. v. Dwyer*, 75 Tex. 572; *Ft. Worth, etc. R. R. Co. v. Lillard*, 16 S. W. Rep. 654; *Gulf, etc. R. R. Co. v. Nelson*, 4 Tex. Civ. App. 345; *Little Rock, etc. R. R. Co. v. Hanniford*, 49 Ark. 291.

² *Gulf, etc. R. R. Co. v. Hefley*, 158 U. S. 96; *Baird v. St. Louis, etc. R. R. Co.*, 41 Fed. Rep. 592; *Mobile, etc. R. R. Co. v. Dismukes*, 94 Ala. 182; *Houston, etc. R. R. Co. v. Campbell* (Tex. Civ. App.), 40 S. W. Rep. 481; *St. Louis & S. W. R. R. Co. v. Carden* (Tex. Civ. App.), 34 S. W. Rep. 145. See *Chicago, R. I. & P. Ry.*

Co. v. Hubbell, 54 Kan. 232; *Savannah, F. & W. R. R. Co. v. Bundick*, 94 Ga. 775. *Conf. Rowland v. New York, N. H. & H. R. R. Co.*, 61 Conn. 108; *Gerber v. Wabash R. R. Co.*, 68 Mo. 145; *Houston & T. C. R. R. Co. v. Dumas*, 43 S. W. Rep. 609; *Houston, E. & W. T. Ry. Co. v. Peters*, 40 S. W. Rep. 429; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

³ *Minnesota v. Corbett*, 57 Minn. 345; *Commonwealth v. Wilson*, 14 Phila. 384; *Burdick v. People*, 149 Ill. 600. See *People v. Warden of City Prison*, 50 N. Y. S. 56.

at fixed rates have generally been applied solely to domestic transportation.¹ It has been suggested that such a statute might apply to transportation between points in the same States incidentally passing through an adjoining State;² but this, as has been seen,³ is contrary to the weight of authority.

It is also held that State statutes providing that railroad tickets shall be good for six years, and that the holder shall have the right to stop off at any station, would be invalid as applied to foreign and interstate journeys.⁴ So a State act requiring a carrier to redeem unused portions of tickets cannot apply to tickets for interstate transportation.⁵ Taxation upon contracts of carriage is a regulation of the carriage itself, and as applied to transportation without the State is beyond State jurisdiction.⁶

Stopping Trains.—A State may require regular passenger trains operating within its territory to stop at county seats;⁷ and these laws are valid as to trains engaged in interstate transportation carrying the United States mail upon a highway granted by the Federal government;⁸ but a railroad company cannot be compelled to send trains out of their course to make stops required by State laws.⁹

Details of Operation.—A State may forbid railroad companies to heat their cars by stoves or furnaces kept inside the cars;¹⁰ may require vessels burning wood to be provided

¹Smith v. Lake Shore, etc. R. R. Co., 72 N. W. Rep. 328; Beardsley v. New York, etc. R. R. Co., 40 N. Y. Supp. 1077, 44 N. Y. Supp. 175.

²Dillon v. Erie R. R. Co., 43 N. Y. Supp. 320.

³Ante, pp. 87-90.

⁴Carpenter v. Grand Trunk Ry. Co., 72 Me. 388; La Farier v. Grand Trunk Ry. Co., 84 Me. 286.

⁵Missouri, K. & T. Ry. Co. v. Fookes, 40 S. W. Rep. 858.

⁶People v. Raymond, 34 Cal. 492.

⁷Chicago & A. R. Co. v. People, 105 Ill. 657; Illinois Central R. R. Co. v. People, 143 Ill. 434; Railroad Co. v. State, 8 Ohio C. C. Rep. 220.

⁸State v. Gladson, 57 Minn. 385; Gladson v. Minnesota, 166 U. S. 427.

⁹Illinois Central R. R. Co. v. Illinois, 163 U. S. 142, reversing Illinois Central R. R. Co. v. People, 143 Ill. 434.

¹⁰People v. Railroad Co., 55 Hun, 409, 8 N. Y. Supp. 672; Railroad Co. v. New York, 165 U. S. 628, 632.

with suitable fire screens;¹ it may require interstate carriers to return statements of earnings made in carriage between points in the State;² to notify the public whether its trains are on time,³ and to return statements of the names, ages, conditions, etc., of alien passengers landed within the State.⁴

So it has been held that when the cost of railroad switching service is not included as a part of an interstate rate, it is local in nature and is subject to State regulation.⁵ Also that a State law requiring railroads to draw cars for other corporations at reasonable rates, to be agreed upon between the parties or fixed by a commission, is a valid exercise of State authority.⁶

Examination of Railway Employees.— It is also held that a State law prescribing the qualifications of locomotive engineers and other railway employees, requiring an examination and imposing a license fee therefor, is a constitutional exercise of the police powers of the States, even as applied to persons engaged solely in transportation between points in different States.⁷

Federal Jurisdiction Over Local Matters.— The authority of the State in matters of local regulation does not, however, exclude the Federal government. "It is not doubted that Congress has the power to go beyond the general regulations of commerce, which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed

¹ *Burrows v. Delta Transportation Co.*, 106 Mich. 582.

² *State v. Pullman's P. C. Co.*, 64 Wis. 82.

³ *State v. Indiana, etc. R. R. Co.*, 133 Ind. 69; *State v. Pennsylvania Co.*, 133 Ind. 700.

⁴ *Comm. v. Brand*, 26 La. Ann. 29. See *Board v. Willamette Trans. Co.*, 6 Oreg. 219.

⁵ *Railroad Co. v. Becker*, 32 Fed.

Rep. 849. See *State of Iowa v. C., M. & St. P. R. Co.*, 33 Fed. Rep. 391.

⁶ *Rae v. Railroad Co.*, 14 Fed. Rep. 401.

⁷ *Smith v. Alabama*, 124 U. S. 465; *Smith v. Alabama*, 85 Ala. 341, overruling previous cases; *McDonald v. State*, 81 Ala. 279; *Nashville, etc. R. R. Co. v. Alabama*, 128 U. S. 96, 83 Ala. 71; *Railroad Co. v. Baldwin*, 85 Ala. 612.

advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States, confining their operations to the subjects over which it is given control by the Constitution, but as the general police power can better be exercised under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest resides in the national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars."¹ When Congress acts in these respects it does not repeal, but suspends, State laws upon the subjects, and when the act producing this result is repealed, or so modified as to permit the operation of the State law, it becomes again valid and in force.²

¹ Cooley's Const. Lim. (4th ed.) 782, cited in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; *Lin Sing v. Washburn*, 20 Cal. 584; *Bradley v. Transportation Co.*, 15 Ohio St. 553; *United States v. Stanley*, 109 U. S. 8, 18.

² *In re Rahrer*, 140 U. S. 545; *Henderson v. Spofford*, 59 N. Y. 131; *Board of Pilot Commissioners v. Pacific Mail S. S. Co.*, 52 N. Y. 609; *Sturgis v. Spofford*, 45 N. Y. 446.

CHAPTER VII

PROHIBITION UPON THE STATES.

In defining the powers of the States, many cases may be found which lay down an apparently absolute line of distinction between State and Federal powers. It needs no argument, it has been said, to show that transportation, and the purchase, sale and exchange of commodities carried on among the States, admits of but one system of regulation, and is subject to Federal control alone.¹

"It has been uniformly held, for example, that the states cannot by legislation place burdens upon commerce with foreign nations or among the several States." "But upon an examination of the cases in which these decisions were rendered," as was said in *Sherlock v. Alling*, 93 U. S. 99, 102, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit, in particular channels, or conditions for carrying it on."²

Furthermore, State legislation, to be unconstitutional as a regulation of commerce, "must be such as will necessarily amount to or operate as a regulation of business without the State as well as within."³

¹ *Mobile v. Kimball*, 103 U. S. 691-703; *Leisy v. Hardin*, 135 U. S. 100; 474.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204. ² *Smith v. Alabama*, 124 U. S. 465.

³ *Stone v. Trust Co.*, 116 U. S. 335.

Both persons and property within the limits of the State are subject to its control, except in so far as they are engaged in and are part of a commerce which extends beyond the State.¹

The line which marks this distinction is, in many cases, exceedingly difficult to trace, but in general terms it has been said that it is the purpose of the Constitution to place the operations of interstate commerce beyond State restrictions. The boundary between State and Federal powers in this respect was well defined by Judge Hammond in the Tennessee Railroad Commission cases:

"The power of Congress to regulate an instrumentality of commerce is practically unlimited because it may reach the commerce itself, as well as its agencies; wherefore, there is no need to look to the character of the regulation in determining the power, but only to the character of the commerce. But when we turn to the power of the states, we must necessarily scrutinize both. . . . The real question, as to the states, always is two-fold,—does the proposed law act upon commerce itself, or does it act only on the instrumentality? If the first, it is always void; if the second, its validity depends on the circumstances. Here lies the fallacy of this and all legislation, which overlooks the not always broad distinction between regulating the commerce itself and its instrumentalities."²

Regulation Not Always Restriction.—Regulation is not necessarily the imposition of a burden. The Federal statutes, for instance, authorize every railroad company in the United States, whose road is operated by steam, to carry passengers and property from State to State; to receive payment therefor, and to connect with roads of other States.³ This statute is a regulation of commerce made by Congress

¹Smith v. Alabama, 124 U. S. 465-476; Sherlock v. Alling, 93 U. S. 99; Philadelphia v. Telegraph Co., 40 Fed. Rep. 615; Dorman v. State, 34 Ala. 218.

²Louisville & N. R. R. Co. v. Railroad Commission, 19 Fed. Rep. 679-709.

³U. S. Rev. Stat., tit. LXIV, sec. 5258.

under the authority of the commerce clause, and yet is permissive only and imposes no burden.¹

There are State enactments, also, which would impose no burden directly and yet would be void. A State law acting outside the State—fixing reasonable rates, for example—would impose no burden, and yet would offer a possibility of conflict between regulations of different States.

To regulate commerce has often been defined as “to prescribe the conditions under which commerce shall be conducted.”² Such a definition as this clearly brings within its scope all regulation of instrumentalities as well as acts of commerce. It is not surprising, therefore, that this definition has been often qualified by the general statement that “it is not everything that affect commerce that amounts to a regulation of it within the meaning of the Constitution.”³

Turning to the cases, it seems that the gist of the limitation upon the power of the States in respect to interstate and foreign commerce may be found in the statement of Mr. Justice Brewer that “the moment you find any act of the legislature, or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States constitution.”⁴

Upon interstate commerce the States may lay no burden whatever, for that, it is said, amounts to such a regulation of it as belongs to Congress alone;⁵ while, on the other hand, it is frequently said that in matters which are “auxiliary to commerce,” or which “may be used in aid of commerce,” the powers of the States, in the absence of Federal action, are unimpaired.⁶

¹ *Railroad Co. v. Richmond*, 19 Wall. 584; *Richmond v. Railway Co.*, 83 Iowa, 423. *State Tax on Gross Receipts*, 15 Wall. 284, 298.

² *Henderson v. The Mayor*, 92 U. S. 259, 270; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; *Welton v. Missouri*, 91 U. S. 278, 280. ⁴ *Ex parte Kieffer*, 40 Fed. Rep. 399; *In re Sanders*, 52 Fed. Rep. 802; *In re Rebman*, 41 Fed. Rep. 867.

³ *Munn v. Illinois*, 94 U. S. 185; ⁵ *Leloup v. Mobile*, 127 U. S. 640, 648.

⁶ *Robbins v. Taxing District*, 120

A State can no more exclude from its territory a corporation engaged in foreign or interstate commerce than it can exclude an individual so engaged.¹

When the business transacted is authorized by the Constitution it may be conducted by any instrumentality, individual or corporate.

"At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations."²

A State May Not Prohibit Entrance to or Exit from its Territory.—Every burden or obstacle laid upon transportation from State to State is a regulation of commerce,³ and beyond the power of the State to impose.⁴

A State cannot refuse to permit any person⁵ or any proper

¹ Cooper Mfg. Co. v. Ferguson, 118 U. S. 727; State v. Pullman Palace Car Co., 16 Fed. Rep. 193; State v. Oil Co., 120 Ind. 575; McNaughton v. McGill (Mont.), 49 Pac. Rep. 651.

² Paul v. Virginia, 8 Wall. 168; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; State v. Pullman P. C. Co., 16 Fed. Rep. 193; State v. Oil Co., 120 Ind. 575.

³ Railroad Co. v. Husen, 95 U. S. 465, 470; Gloucester Ferry Co. v.

Pennsylvania, 114 U. S. 196; Sherlock v. Alling, 98 U. S. 99, 103.

⁴ Laloup v. Mobile, 127 U. S. 648; Robbins v. Taxing District, 120 U. S. 465.

⁵ Crandall v. Nevada, 6 Wall. 35; Ex parte Ah Cue, 101 Cal. 197; Ah Kow v. Nunan, 5 Sawy. 563; Ex parte Lippman, 35 Pac. Rep. 557; Joseph v. Randolph, 71 Ala. 499; Validity of South Carolina Police Bill, 1 Op. Atty. Gen. 659. Conf. Validity of South Carolina Police

subject of commerce to enter or leave its territory;¹ nor can it impose any tax upon the act of entering or leaving;² nor any conditions³ upon that right. A State may not compel transshipment of freight within its limits,⁴ nor prohibit crews of foreign vessels from working on the wharves loading and unloading their ship;⁵ nor may it compel vessels entering its ports and in need of a survey or examination to employ State officers for the purpose.⁶

Even in the exercise of its legitimate quarantine and police powers, a State may not go beyond the necessity for their exercise and exclude lawful subjects of commerce. Statutes which forbade the importation of all Southern cattle during certain periods of the year have therefore been held invalid,⁷

Bill, 2 Op. Atty. Gen. 426; *ante*, pp. 56, 57.

¹ *Farris v. Henderson*, 1 Okl. 384; *Bowman v. Railroad Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *Adams Express Co. v. Board*, 65 How. Pr. 72; *Dinsmore v. Board*, 12 Abb. N. C. 486; *Council Bluffs v. Kansas City Ry. Co.*, 45 Iowa, 338; *The Cynosure*, 1 Sprague, 88; *The William Jarvis*, 1 Sprague, 485; *Urton v. Sherlock*, 75 Mo. 247; *Rothermel v. Meyerle*, 7 Pa. Co. Ct. Rep. 616; *State v. Cobaugh*, 78 Me. 401; *State v. Stilsing*, 52 N. J. L. 517; *Schollenberger v. Pennsylvania*, 18 Sup. Ct. Rep. 757.

² *New York v. Miln*, 11 Pet. 102; *Passenger Cases*, 7 How. 283; *People v. Downer*, 7 Cal. 169; *Clark v. Philadelphia, etc. Co.*, 4 Houst. 158; *Jackson Mining Co. v. Auditor-General*, 32 Mich. 488; *Salzenstein v. Mavis*, 91 Ill. 391; *Territory v. Evans*, 28 Pac. Rep. 115; *Carson River Lumber Co. v. Patterson*, 38 Cal. 334; *State v. Saunders*, 19 Kan. 137;

State v. Indiana & Ohio Oil Co., 120 Ind. 575; *Telegraph Co. v. Texas*, 105 U. S. 466; *Cannon v. New Orleans*, 20 Wall. 577.

³ *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 737; *Joseph v. Randolph*, 71 Ala. 499; *People v. Pacific Mail S. S. Co.*, 16 Fed. Rep. 344, 8 Sawy. 640; *Lin Sing v. Washburn*, 20 Cal. 534; *People v. Downer*, 7 Cal. 169; *Mitchell v. Steelman*, 8 Cal. 363; *Chy Lung v. Freeman*, 92 U. S. 275; *New York v. Campagnie, etc.*, 107 U. S. 59; *Henderson v. The Mayor*, 92 U. S. 259; *Brown v. Maryland*, 12 Wheat. 419.

⁴ *Council Bluffs v. Kansas City Ry. Co.*, 45 Iowa, 348.

⁵ *Cuban S. S. Co. v. Fitzpatrick*, 66 Fed. Rep. 63.

⁶ *Port Wardens of New York v. Cartwright*, 4 Sandf. 236.

⁷ *Ante*, pp. 170-174; *Railway Co. v. Husen*, 95 U. S. 465; *Grimes v. Eddy*, 126 Mo. 168; *Jarvis v. Riggins*, 94 Ill. 164; *Salzenstein v. Mavis*, 91 Ill. 391; *Urton v. Sherlock*, 75 Mo. 247. *Conf. State v. Duckworth*, 51 Pac. Rep. 456.

overruling earlier cases;¹ and a railroad company is not excused by such a statute from receiving such cattle for transportation.²

So statutes have been held invalid which operate to exclude dressed meats,³ baking powder,⁴ convict-made goods,⁵ agricultural products,⁶ or liquor.⁷

State laws prohibiting the introduction of oleomargarine are invalid as applied to oleomargarine imported from other States,⁸ although it has been held that oleomargarine colored to present the appearance of butter may be excluded as an exercise of the authority of the State to prevent fraud or deception.⁹

¹ *Ante*, pp. 170-174; *Wilson v. Railway Co.*, 60 Mo. 184; *Mercer v. Kansas City, etc. Ry. Co.*, 60 Mo. 397; *Kenney v. Hannibal, etc. Ry. Co.*, 63 Mo. 476.

² *Chicago & Alton Ry. Co. v. Erikson*, 91 Ill. 618.

³ *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313; *Georgia Packing Co. v. Mayor, etc. of Macon*, 60 Fed. Rep. 774; *In re Rebman*, 41 Fed. Rep. 867; *Swift v. Sutphin*, 39 Fed. Rep. 680; *In re Christian*, 39 Fed. Rep. 686; *Harvey v. Huffman*, 39 Fed. Rep. 646; *In re Barber*, 39 Fed. Rep. 641; *Ex parte Kieffer*, 40 Fed. Rep. 399; *Hoffman v. Harvey*, 128 Ind. 600; *State v. Klein*, 126 Ind. 68; *Schmidt v. People*, 18 Colo. 78.

⁴ *In re Ware*, 53 Fed. Rep. 783.

⁵ *People v. Hawkins*, 31 N. Y. S. 115; *People v. Hawkins*, 85 Hun, 43; *People v. Hawkins*, 47 N. Y. Supp. 56; *In re Yanders* (Ohio Ct. Com. Pl.), 2 Ohio Dec. 126; *Arnold v. Yanders*, 56 Ohio St. 417. Articles made wholly or in part in any foreign country by convict labor may not be imported into the

United States. Act of October 1, 1890, 26 Stat. L., secs. 51, 567, Supp. Rev. Stat. 868; Act of August 27, 1894, 28 Stat. L. 552; Act of July 24, 1897, sec. 81, 1st session 55th Cong., p. 211.

⁶ *In re Schecter*, 68 Fed. Rep. 695; *State v. Duckworth*, 51 Pac. Rep. 456; *Commonwealth v. Simons*, 3 Pa. Dist. Rep. 792; *Spellman v. New Orleans*, 45 Fed. Rep. 2.

⁷ *Ante*, p. 69; *State v. Nash*, 97 N. C. 514; *Ex parte Loeb*, 73 Fed. Rep. 657; *Donald v. Scott*, 74 Fed. Rep. 859.

⁸ *Schollenberger v. Pennsylvania*, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 18 Sup. Ct. Rep. 763; *In re Worthen*, 58 Fed. Rep. 467; *Ex parte Scott*, 66 Fed. Rep. 45; *In re McAllister*, 51 Fed. Rep. 283; *In re Gooch*, 44 Fed. Rep. 276; *Waterbury v. Egan*, 23 N. Y. Supp. 115; *Commonwealth v. Paul*, 9 Pa. Co. Ct. Rep. 196, 10 Pa. Co. Ct. Rep. 332; *Commonwealth v. Schollenberger*, 12 Pa. Co. Ct. Rep. 443. *Contra*, *Commonwealth v. Schollenberger*, 156 Pa. St. 201.

⁹ *Ante*, p. 49; *Plumley v. Massa-*

Statutes regulating the pressure at which natural gas or petroleum may be transported have also been declared unconstitutional where their effect has been to prevent the transportation of gas or petroleum out of the State.¹

Taxation upon the act of entering or leaving a State may often come within the constitutional prohibition against State duties on tonnage as well as within the implied prohibition of the commerce clause.²

Conditions Imposed upon Conduct of Interstate Business. By the laws of several States, conditions have been imposed on the right of a foreign corporation to do business or to maintain an action within its limits. The conditions which are most common require that the corporation shall file a copy of its charter with some State officer, and designate an agent upon whom process may be served. Such a requirement cannot be made a condition of the right of a foreign corporation to engage in interstate commerce,³ and, though

chusetts, 155 U. S. 461; Commonwealth v. Huntley, 156 Mass. 286; State v. Newton, 50 N. J. L. 584; Butler v. Chambers, 36 Minn. 69; State v. Addington, 77 Mo. 110. Conf. Commonwealth v. Schollenberger, 170 Pa. St. 296; Commonwealth v. Schollenberger, 156 Pa. St. 201; Commonwealth v. Schollenberger, 12 Pa. Co. Ct. Rep. 442; Commonwealth v. Paul, 170 Pa. St. 284; Commonwealth v. Paul, 148 Pa. St. 559; Commonwealth v. Paul, 9 Pa. Co. Ct. Rep. 196; Commonwealth v. Paul, 10 Pa. Co. Ct. Rep. 332.

¹ Benedict v. Columbus Construction Co., 49 N. J. Eq. 23; State ex rel. Corwin v. Indiana, etc. Gas Co., 120 Ind. 575; Avery v. Indiana, etc. Gas Co., 120 Ind. 600. See, however, Jamieson v. Indiana, etc. Gas Co., 128 Ind. 555.

² Transportation Co. v. Parkersburg, 107 U. S. 691.

³ Fritts v. Palmer, 182 U. S. 262; Cooper Mfg. Co. v. Ferguson, 118 U. S. 727; Lyon-Thomas Hardware Co. v. Reading Hardware Co., 21 S. W. Rep. 360; Bateman v. Western Star Milling Co., 1 Tex. Civ. App. 90; Singer Mfg. Co. v. Hardee, 4 N. Mex. 676; American Starch Co. v. Bateman, 22 S. W. Rep. 771; Coit v. Sutton, 102 Mich. 324; Gunn v. White Sewing Machine Co., 57 Ark. 24; Kindel v. Beck & Pauli Lithographing Co., 19 Colo. 310; Murphy Varnish Co. v. Connell, 82 N. Y. Supp. 492; Milan Milling Co. v. Gorten, 93 Tenn. 590; New Orleans, etc. Packet Co. v. James, 32 Fed. Rep. 21; Miller v. Goodman, 91 Tex. 41; Cone, etc. Mfg. Co. v. Rosenbaum (Tex. Civ. App.), 45 S. W. Rep. 388; Allen v. Tyson-

not amounting to a condition, is invalid with reference to companies which have no established office in the State.¹ Where, however, a corporation engages in other business than that of interstate commerce, such regulations may be applied to that business.²

It has been held also that a statute requiring carriers who bring into the State persons not having a settlement therein to remove them if they fall into distress within a year,³ or to give bond to protect the county for expense incurred within two years thereafter for their relief,⁴ are regulations of foreign and interstate commerce in violation of the Federal Constitution.

It has been held in Iowa that a foreign railroad corporation coming into the State in the conduct of interstate business may be required to submit to the jurisdiction of the State courts to the exclusion of the Federal courts,⁵ but this rule is opposed to the doctrine of more recent cases.⁶

Jones Buggy Co., 91 Tex. 22; Toledo Commercial Co. v. Glen Mfg. Co., 11 Ohio C. C. R. 153; Haldy v. To Moor-Haldy Co., 8 O. N. P. 43, 1 O. S. D. 118; Keating, etc. Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666; Ware v. Shoe Co., 92 Ala. 145; Jung Brewing Co. v. Levisy, 37 S. W. Rep. 889; Shaw Piano Co. v. Ford (Tex. Civ. App.), 41 S. W. Rep. 198; Brin v. Wachusett Shirt Co. (Tex. Civ. App.), 43 S. W. Rep. 295; McNaughton v. McGirl (Mont.), 49 Pac. Rep. 651; Culberson v. American Trust Co., 107 Ala. 457. Conf. Holder v. Aultman, 169 U. S. 81, 68 Fed. Rep. 467. *Contra*, Telegraph Co. v. Telegraph Co., 67 Ala. 26.

¹ See Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

² Western Paper Bag Co. v. Johnson (Tex. Civ. App.), 38 S. W. Rep. 364; Fritts v. Palmer, 183 U. S. 282; Huffman v. Western Mortgage & Investment Co., 13 Tex. Civ. App. 169; 36 S. W. Rep. 806.

³ City of Bangor v. Smith, 83 Me. 422. Conf. Mayor of New York v. Staples, 6 Cow. 168; Candler v. Mayor of New York, 1 Wend. 498; Smith v. Turner, 7 How. 283; The Cynosure, 1 Sprague, 88; The Ship William Jarvis, 1 Sprague, 485.

⁴ State v. S. S. Constitution, 42 Cal. 578.

⁵ Goodrell v. Kreichbaum, 70 Iowa, 862.

⁶ Barron v. Burnside, 121 U. S. 186.

CHAPTER VIII.

TAXATION.

It is the power of taxation belonging to the States which, next after the police power, has given rise to most of the cases defining the limitation imposed by the commerce clause, and here, as in the case of the police power, it has been strongly urged that the authority of the State is paramount.

In the argument of *Gibbons v. Ogden* as to the exclusiveness of the Federal commercial power, it was said that, as a rule is known by its exceptions, we must assume that a State, in the exercise of its commercial power, might have taxed exports, imports, and tonnage of vessels were it not that such taxes are expressly prohibited by the Constitution; and when Mr. Chief Justice Marshall answered this argument by saying that the prohibitions referred to were exceptions from the State power of taxation, and not from any commercial power, the inference was drawn that in the exercise of its power of taxation the State was unhindered by implied commercial restrictions.

This view appears to have had great weight in the supreme court of Pennsylvania in the case of the *State Freight Tax*,¹ and was stated by Mr. Chief Justice Taney in the *Passenger Cases* with startling distinctness. "I may, therefore, safely assume," he says, "that according to the true construction of the constitution, the power granted to congress to regulate commerce, did not in any degree abridge the power of taxation in the States. . . . They are expressly prohibited from laying any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So

¹ 62 Pa. St. 286.

far their taxing power over commerce is restrained but no further."¹

Taxation is Regulation.—It is clear that such an interpretation as that for which Mr. Chief Justice Taney contended would be wholly incompatible with the controlling purpose of the Constitution to secure commerce among the States from State regulation. There seems to be no doubt that the Convention understood the power of taxation was capable of use, not only as a means of revenue, but also for commercial regulation.

"The line of distinction," Madison says, "between the power of regulating trade and that of drawing revenue from it, which was once considered a barrier of our liberties, was found upon discussion to be absolutely indefinable."²

Again, in commenting upon the case of *McCulloch v. Maryland*, Madison remarks: "When the distinction between separate powers is disregarded and for the definite connection between means and ends, is substituted legislative discretion as to the former, the legislative power becomes limitless. Ends may shift their character, and will, according to the exigency of the legislative body. What is an end in one case may be a means in another; may, in the same case, be either an end or a means at the legislative option. The British Parliament in collecting revenue from the commerce of America, found no difficulty in calling it either a tax for the regulation of trade, or the regulation of trade with a view to a tax, as suited the argument or the policy of the moment."³

Upon this subject, too, the decisions of the court have been uniform that if the right to impose a tax exists it is a

¹ 7 How. 283, 480; *People v. Naglee*, 1 Cal. 232. Conf. Federalist, No. XXXII; *Johnson v. Drummond*, 20 Gratt. 412. Speech in the House of Lords as given in Thackeray's *Life of Chatham*, vol. 2, p. 281.

² Letter of Madison to Judge

³ Letter of Madison to Jefferson, October 24, 1787. Conf. Chatham's

right which in its nature acknowledges no limits. "It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state or corporation may prescribe."¹

"Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."²

When the State may tax at all, the manner in which the tax shall be assessed, and the rate of taxation, however arbitrary or capricious, are matters of legislative discretion. It is not for the Federal court to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed. The only concern of that court is with the validity of the tax; all else is beyond its jurisdiction.³

The question is affected also by the constitutional right of persons and corporations to the equal protection of the laws. This subject will most often occur in the enforcement of the laws imposing taxes. A person is denied the equal protection of the laws if his property is subjected to a higher rate of taxation than is imposed upon like property of others.⁴

Any unequal tax resting upon property or persons engaged in commerce may therefore be open to this constitutional objection.

Taxation upon commerce may, therefore, always be regarded as regulation,⁵ and the validity of the tax will depend upon the jurisdiction of the taxing power over the subjects upon which the tax falls. The line which marks the limit of State sovereignty in imposing taxation, upon one hand, and the power and duty of the Federal government, upon the

¹ *Weston v. Charleston*, 2 Pet. 449, 466.

² *State Tax on Foreign-held Bonds*, 15 Wall. 800, 819.

³ *Delaware Railroad Tax*, 18 Wall. 206, 231; *Steamship Co. v. Pennsylvania*, 123 U. S. 828-836; *Vermont*

& *Canada R. R. Co. v. Vermont Central R. R. Co.*, 68 Vt. 119.

⁴ *Opinion of Mr. Justice Harlan in Philadelphia Fire Association v. New York*, 119 U. S. 110, 120.

⁵ *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 695.

other hand, to protect articles of interstate commerce, is always difficult to trace. It may be that where the powers most closely approach each other no very satisfactory line of demarcation may be found; but there are certain well-recognized principles which must control every decision upon the subject.

Validity of Tax Determined by its Effect.—The first of these principles is that the question of the constitutionality of a State tax is to be determined, not by the form of the agency through which it is to be collected, but by the subject upon which the burden is actually laid.¹

“It is a just and well-settled doctrine established by this court, that a state cannot do that indirectly which she is forbidden by the constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce, graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names.”²

It must be shown that the subject of taxation, when determined, is within the jurisdiction of the State. “Jurisdiction is as necessary to valid legislative as to valid judicial action.”³

“The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission;” but it does not extend to those things which are withdrawn by the Constitution of the United States from its operation and control.⁴

¹ *Telegraph Co. v. Texas*, 105 U. S. 460, 465; *Cook v. Pennsylvania*, 97 U. S. 566, 572; *State Freight Taxes*, 15 Wall. 232, 272; *Bank Tax Case*, 2 Wall. 200; *Bank of Commerce v. New York State*, 2 Black, 620.

² *Passenger Cases*, 7 How. 283, 458.

³ *St. Louis v. Ferry Co.*, 11 Wall. 423, 430.

⁴ *McCullough v. Maryland*, 4 Wheat. 316.

Upon interstate commerce the State can lay no tax in any form, and the reason is that such tax is a burden on interstate commerce, and amounts to a regulation of it, which belongs solely to Congress.¹

In every case of this character the determining consideration is to be found in the effect of the tax; that is, in the answer to the question whether the tax is a burden or restriction upon communication between the States. A tax upon the property of agents engaged in interstate commerce having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may rightfully be laid by the States. A tax upon their operation is a direct obstruction to the exercise of powers protected by the Federal Constitution which no State may create.²

In *McCulloch v. Maryland* "the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all, except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. 'It does not extend,' said the Chief Justice, 'to a tax paid upon the real property of the bank in common with the other real property in the State, nor to a tax imposed on an interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of

¹ *Leloup v. Mobile*, 127 U. S. 640; ² *Railroad Co. v. Peniston*, 18 Robbins v. Taxing District, 120 U. S. Wall 5. 489; *Simmons H. Co. v. McGuire*, 89 La. Ann. 848.

the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government.'"¹

"In *Osborne v. The Bank*, the tax held unconstitutional was a tax upon the existence of the bank,—upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which Congress for National purposes had authorized the bank to perform. For this reason the power of the State to direct it was denied, but at the same time it was declared by the court that the local property of the bank might be taxed, and as in *McCulloch v. Maryland*, a difference was pointed out between a tax upon its property and one upon its action."²

Taxation on acts of trade between the States is always inadmissible.³

Conflict in the Decisions.—The enunciation of the foregoing rules, however, helps little to an understanding of the actual position of the courts upon this subject. In considering the various cases which have arisen respecting the legality of State legislation in its effect upon interstate commerce, and especially with regard to the exercise of taxing power, there is a conflict, both in the decisions and in the grounds upon which they rest.

Although the rule laid down in *Coolley v. Board of Wardens*, supplemented by the statement that it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution,⁴ was supposed to

¹ *Railroad Co. v. Peniston*, 18 Wall. 5, 85.

³ *Ex parte Brown*, 48 Fed. Rep. 435, 443.

² *Railroad Co. v. Peniston*, 18 Wall. 5, 85.

⁴ *Munn v. Illinois*, 94 U. S. 135; *State Tax on Railroad Receipts*, 15 Wall. 293.

afford a practical guide to the solution of questions arising under the commerce clause, yet the apparent uncertainty since those decisions is, perhaps, greater than before. As was said in *Railroad Co. v. Husen*,¹ "it is sometimes difficult to define the distinction between that which merely affects or influences, and that which regulates or furnishes a rule for conduct." It is because of this difficulty that the rule has largely lost its usefulness.

It is said, for instance, that State regulations may not act upon subjects of commerce before they have passed from first hands and original packages; and yet taxation upon such packages is sustained in *Brown v. Houston*;² and in *Patapsco Guano Co. v. Board of Agriculture*³ they were held subject to State inspection laws, while in the case of *Sanders*⁴ a similar regulation was held invalid.

It has been said that no tax may be laid upon receipts derived from interstate commerce, for that would be a direct tax upon interstate commerce;⁵ and yet, at the same time that this rule was announced, it was suggested that these receipts might be taxed if included in a "general income tax;" and in *Maine v. Grand Trunk Railroad Co.*⁶ a tax measured by gross receipts was sustained.

It has been said that no State jurisdiction whatever exists over property in transit through the State; and yet a tax upon such property was sustained in *Pullman's Palace Car Co. v. Twombly*,⁷ and in other recent cases.⁸

The Pickard case⁹ holds that an occupation or franchise tax upon the business of engaging in commerce is a direct tax upon an operation of commerce, within the constitutional prohibition; and yet a State tax levied upon an interstate carrier was recently sustained because it was levied "for the

¹ 95 U. S. 465, 472.

² 114 U. S. 622.

³ 52 Fed. Rep. 690.

⁴ 52 Fed. Rep. 802.

⁵ *Steamship Co. v. Pennsylvania*, 122 U. S. 326.

⁶ 142 U. S. 217.

⁷ 29 Fed. Rep. 658.

⁸ *Pullman's P. C. Co. v. Commonwealth*, 141 U. S. 18, 38.

⁹ *Pickard v. Pullman Co.*, 117 U. S. 84; *Tennessee v. Pullman Co.*, 117 U. S. 51.

privilege of exercising its franchise within the State of Maine."¹

Out of this field of contradictory decisions, of which the Supreme Court itself has said that "it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing,"² it is possible to determine the rule which the court has followed in its decisions only by reference to the history of the doctrines which have attended the development of the commerce clause.

Three Periods of Development.—This history may be divided into three periods.

The first begins with *Gibbons v. Ogden* and ends in 1851 with *Cooley v. The Port Wardens*. *Gibbons v. Ogden* decided that the Federal power over commerce is a unit and exclusive of all State authority over commerce among the States or with foreign nations. This absolute rule found its consistent and necessary development in *Brown v. Maryland*.

The second period, beginning with *Cooley v. The Port Wardens*, is marked by a slow return to the old absolute rule, and finds its extreme statement in *Leisy v. Hardin* and *Robbins v. Taxing District*.

Cooley v. The Port Wardens decided that the Federal power was no longer to be regarded as exclusive of all State jurisdiction throughout its whole scope. The Federal power after 1851 was regarded as divided into two fields; one being national in its character, exclusive of State jurisdiction, and the other field being one of jurisdiction over matters of local interest in which the States could act until superseded by Federal authority. The purpose of the commerce clause, it was said, was to prevent conflicting and discriminating State legislation, and the construction necessary for this purpose

¹ *Maine v. Grand Trunk Ry. Co.*, 240; *Postal Telegraph Co. v. Adams*, 142 U. S. 217. 155 U. S. 688, 695.

² *Fargo v. Michigan*, 121 U. S. 230—

would thereafter be adopted; but beyond this no absolute rule was suggested. *Woodruff v. Parham* was as consistent and necessary a development of this rule as *Brown v. Maryland* was of the rule announced in *Gibbons v. Ogden*.

It soon became apparent, however, that discrimination was very difficult to detect, and might often exist in fact in a law which forbade it. A tax, for instance, upon all freight moved within the State of Pennsylvania might readily be borne by citizens of that State in its application to their domestic transportation, if by so doing they could levy tribute upon the immense traffic between East and West, North and South, which must necessarily pass through their borders. The efforts of Pennsylvania in this direction appear to have begun shortly after the completion of the Cumberland Road through its territory,¹ and that these efforts have met with some success is shown by the persistency with which that State maintains this policy of taxation, and the large number of interstate commerce cases to which it is a party.

So if a State should tax imports from other States, equally with domestic articles, it could practically exclude the products of other States. North Carolina might tax manufactured cloths, and Massachusetts might tax cotton. In either case such a tax would comply with all requirements of equality, and might nevertheless seriously check, or possibly destroy, commerce among the States in the article taxed.²

So State taxation upon commercial travelers, although levied with entire equality upon all commercial travelers within the State, nevertheless bears hardest upon non-residents, and in its practical effect amounts to a discrimination against their trade.

These difficulties were clearly apparent in the decision of *Bowman v. C. & N. W. Ry. Co.*,³ *Robbins v. Tawing District*⁴ and *Leisy v. Hardin*,⁵ where the Supreme Court established

¹ *Searight v. Stokes*, 8 How. 151. Nelson in *Woodruff v. Parham*, 8

² *Fertilizing Co. v. Board of Agriculture*, 48 Fed. Rep. 609, 618. See Wall 128.

³ 125 U. S. 465.

⁴ 120 U. S. 489.

⁵ 135 U. S. 100.

an absolute rule of construction. In these cases it was announced that interstate commerce could not be taxed at all, even though the same burden was laid upon domestic commerce within the State. With respect to interstate commerce the States did not exist.

Following the announcement of this rule came the abandonment of the doctrine laid down in *Woodruff v. Parham*, and in its place *Leisy v. Hardin* re-established the doctrine which *Brown v. Maryland* established in respect to foreign commerce, and suggested in respect to interstate commerce. The case of the *State Tax on Gross Receipts* was overruled in *Steamship Co. v. Pennsylvania*. Thereafter in national matters there was to be no division of authority whatever.

The third period in the development of judicial doctrines began shortly after the case of *Leisy v. Hardin*, and establishes a new arbitrary rule in place of the absolute rule of *Robbins v. Taxing District*.

It is true that *Steamship Co. v. Pennsylvania*, *Robbins v. Taxing District* and *Leisy v. Hardin* are not, in terms, overruled, and many expressions may be found in recent opinions quoting and applying the absolute statements contained in those cases.

It is still said that interstate commerce cannot be taxed at all, but the expression has no longer the meaning which was given to it in *Steamship Co. v. Pennsylvania*, *Pickard v. Pullman Co.*, or *Leisy v. Hardin*. The rule that interstate commerce cannot be taxed no longer prohibits taxation of receipts partly or wholly derived from interstate transportation, nor does it prohibit taxation of vehicles which enter the taxing State only in the conduct of interstate commerce.

It is clear, therefore, that the rule that interstate commerce cannot be taxed at all, and that so far as this commerce is concerned the States do not exist, is no longer followed.

The explanation of the change is probably to be found in the character of the tax which has been sustained in the

recent cases, and in the apparent necessity for the establishment of some more equitable division between the powers of State and Federal governments.

In the Pullman case,¹ to which reference has been made, it is true that the principal office of the company was in Illinois, but its cars were used in transportation throughout the United States, and there was no time when the company had not a large property within the State of Pennsylvania receiving the protection of that State. Its interest there was permanent, although the cars were changing. It seemed, therefore, that some contribution should be made by the Pullman Company to the support of the State government; but nothing could be compelled under the absolute rule, for the business of the company was interstate commerce, and a tax laid upon that business would be a tax upon that commerce.²

The same considerations apply with greater or less force to railway, telegraph and express companies. As was said in *Pacific Express Co. v. Seibert*,³ unless the State could levy a tax upon the receipts of express companies it could levy no adequate tax, for the company had no considerable property in the State outside of its business, which was a large and valuable asset.

The Rule of Apportionment.—It was sought to solve the embarrassments of this situation by a rule of apportionment.

In the Pullman case a tax upon all property of the company proportioned to the mileage operated within and without the State of Pennsylvania was sustained. Such a rule was felt to be approximately just, and, as the court said, if levied by every State would amount to no more than a fair assessment upon all the property of the company.

The rule thus sanctioned has been followed, and taxation has been sustained when proportioned not only to mileage, but also to gross and net receipts, and in other ways.

¹Pullman Co. v. Pennsylvania, 84; Tennessee v. Pullman Co., 117
141 U. S. 18, 36. U. S. 51.

²Pickard v. Pullman Co., 117 U. S. ³142 U. S. 339.

Its application is not, however, without difficulty, as will be seen on examining the cases. In the first place, it involves a modification of the fundamental rule that a State may not tax property beyond its jurisdiction. Under the rule of apportionment the tax is levied upon an aliquot part of all the property and assets of the company, and is not limited to that actually within the State.

In *Express Co. v. Ohio*,¹ a company having but forty-two thousand dollars' worth of property within the State was taxed upon a valuation of over half a million, because the particular method of apportionment adopted brought about this result. Another method might have produced a different result.

It is clear that such a rule as this, as the different State governments are actually applying it, can no longer be regarded as approximately just. Under existing conditions the States have acquired the power, to a greater extent than at any other time since the adoption of the Constitution, to make the burden of their taxes fall upon persons and property beyond their jurisdiction.

It is to be noted that in the principal cases which established this rule there has been a strong dissenting minority. The difficulties attending its application are great, and it is probable that it will require some qualification.

The difficulty is increased also by the method which the States have adopted of exercising rights which undoubtedly belong to them.

Every tax but a poll tax must necessarily fall either upon property or upon operations. An *ad valorem* tax upon property actually within the taxing State is a burden to which all property is subject. Exemption from such tax would be discrimination against property not so favored.

Any other tax than this must fall upon something beside property, and therefore partly or wholly upon operations. An illustration of this is found in the taxation of franchises. A franchise, it is said, is itself property, and may be taxed,

¹ 165 U. S. 794, 166 U. S. 185.

like other property, by the State of its grant. Whatever may be the merit of this proposition from the standpoint of legal decisions, its logic as applied to interstate commerce is certainly open to criticism, and its practical operation is a source of much of the confusion which has been traced in the cases.

Upon principle, a franchise of incorporation is property to the same extent only that a partnership agreement is property. The chief practical difference between the two lies in the limited liability of stockholders in a corporation, and in the advantage which a member has of being able to assign his interest without working a dissolution of the company. If in the history of the law a royal grant had been required for every partnership contract, the nature of a corporate charter would not have been essentially different from that of articles of copartnership, and, except as a historical fact, there is now no essential difference in the nature of these contracts as property.

Where no special rights are granted, such as eminent domain or exclusive ferriage, but the franchise is a grant to the corporation of such rights only as belong to natural persons under the Constitution, the franchise is not of the nature of property, but is incidental to the use of property, and a means by which commercial operations are accomplished. When a tax is laid upon such a franchise, it makes no practical difference whether it be said that the burden is imposed upon the right to be or the power to do,—in either event it is something more than a property tax, and is a burden upon the operations in which the franchise is used. It is unimportant to a transportation company that the State tax rests upon the State franchise to engage in commerce generally, and not upon its constitutional right to engage in interstate commerce. The distinction is of value only to support an additional tax upon a corporation whose property has already been taxed as far as the law permits.

When a State gives to certain persons a corporate franchise which includes greater rights than those belonging to

natural persons,—where the franchise, for example, like that of an exclusive right of ferriage, is not a mere means of doing business, but a grant of the business itself; or, like the right of eminent domain, is a grant of special means of acquiring property,—taxation imposed solely upon these special franchises is not a burden upon general operations of commerce. A tax upon the right of eminent domain belonging to a railroad company, if imposed as a property tax and levied only when and with regard to the extent that the right is exercised, would not be a tax upon the operations of transportation. It rarely happens, however, that it is so levied. Such special franchises are commonly referred to only in argument supporting taxation upon all the corporate franchises and powers.

All taxation, therefore, except an *ad valorem* tax upon property, involves taxation of operations, and, when the operation is that of transportation from State to State, falls upon interstate commerce. So long as such taxes are sustained, no consistent and unvarying rule of logic can distinguish that taxation which is permitted from that which is condemned; but the effort must, in each case, be to find some practical solution which will prevent unreasonable restrictions upon interstate transportation.

The Probable Rule.—An examination of the cases affords an indication of some of the modifications which may be expected in the rule last announced by the Supreme Court.

It is, of course, true that discrimination in the commercial regulations of any State is a violation of the Federal Constitution and within the prohibition of the commerce clause. But the purpose of the framers of the Constitution did not stop with the prohibition of discrimination. There is a large class of cases in which no discrimination appears and which are, nevertheless, clearly unconstitutional. Of these cases a good example may be found in *Hall v. De Cuir*,¹ where the possibilities of conflict between legislation of different

¹ 95 U. S. 485.

States was such as to prevent the court from so construing the Constitution as to allow the jurisdiction claimed. We may expect, therefore, that the construction placed upon the commerce clause will be such that State legislation based upon theories which involve an admission of power in the State to discriminate against citizens of other States, or to enact regulations which would burden traffic with inconsistent or conflicting obligations, will always be unconstitutional.

We may also expect that the principle will be established that taxation or regulation operating upon business or property without the State, such as was permitted in *Express Co. v. Ohio*, will be considered as within the prohibition of the clause.¹

It is apparent that each case in which these questions arise must be judged by itself and with reference to the surrounding commercial situation, and of this general situation the court will take judicial notice.²

Situs as Affected by the Character of Regulation.—Situs for purposes of other regulations is not always situs for taxation. It is not true that whenever persons or property claim the protection of a State government they are liable to contribute to the burdens of that government.

Persons or property within a State are always subject in some degree to its police power. The State has the authority at once, upon admission of dangerous explosives, to take all steps necessary for protection of persons and property within its jurisdiction. The explosives, therefore, for the purpose of these regulations, acquire situs within the State the instant of passing the State line.

Situs for purposes of taxation, however, is not so easily acquired. Persons or property in transit have a right to the protection afforded by the State government, and the com-

¹ *Conf. Railway Co. v. Backus*, 154 U. S. 439, 445; *Stone v. Trust Co.*, 435 U. S. 335.
² *Ex parte Brown*, 48 Fed. Rep. 485.

pensation which the State derives is to be found in the mutual obligations of different States. It is not until after transportation has ceased that goods brought into the State may be said to have acquired a situs for taxation.

TAXATION UPON PERSONS IN TRANSIT.

Although the Articles of Confederation contained the provision that the people of each State should have free ingress and regress to and from every other State, no corresponding provision was expressly inserted in the Constitution; while, on the other hand, the provision that "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight,"¹ contained an implication that in the absence of Federal legislation admission of persons within State limits was a matter upon which each State could exercise its own discretion.

The apparent uncertainty thus created was increased by the early construction placed upon the Constitution both by the States and Congress, and by the importance which the slave interest attributed to the maintenance of this power in State governments.

In Maryland, Virginia and Connecticut the right to carry passengers upon stage-coaches was granted by the State as a monopoly, and it appears that these laws were construed as applying to travel between States.²

In this action the Federal authorities acquiesced, and it was said that a motion was made in the second Congress to permit stage-coaches carrying the mails from State to State to transport passengers also, but was lost as in violation of the rights of the States.³

¹ First clause, sec. 9, art. 1, Const. *Raritan, etc. R. R. Co. v. Delaware*

² *Perrin v. Sikes*, Day's Cases in Error, p. 19; *McMaster's History of American People*, vol. 2, p. 60; *Gibbons v. Ogden*, 9 Wheat. 1. Conf. *Raritan Canal Co.*, 18 N. J. Eq. 546.

³ *McMaster's History of the American People*, vol. 2, p. 60.

In 1818 permission of the State appears to have been considered necessary in Connecticut to permit the proprietors of the mail stages to carry passengers through that State on Sunday.¹

It was in relation to slavery, however, that this question assumed greatest importance. States in which slavery had been abolished forbade the admission of slaves within their territory, and insisted that disobedience resulted in emancipation of the slaves. States in which slavery had not been abolished forbade the admission of free persons of color. The constitution of Missouri, at the time that State applied for admission to the Union, contained a provision prohibiting the entrance of free negroes and mulattoes within the limits of the State. It was strongly argued that this provision was unconstitutional. "The simple power of locomotion is all that is asked for now," said Mr. Sargent, of Pennsylvania, "and certainly that must be one of the privileges and immunities of citizenship." Mr. Sargent's argument did not meet with the approval of the House; and the State was admitted with this provision in its organic law. Similar provisions were enacted and enforced in other States.²

One has but to read the account of Mr. Samuel Hoar's mission to South Carolina in 1844, as given by Prof. Von Holst in his *Constitutional History of the United States*,³ and by Mr. Henry Wilson in his *Rise and Fall of Slave Power in America*,⁴ to recognize the immense political significance of the constitutional question.

This was well understood in 1837, when the case of *The City of New York v. Miln*⁵ presented to the Supreme Court, for the first time, the question of State jurisdiction over travelers. The law involved was a statute of New York requiring the master of a vessel arriving from a foreign country to report to the mayor an account of his passengers. Such

¹ Schouler's *History of U. S.*, vol. 8, p. 54.

² 1846-1850, p. 128.

³ Vol. 1, pp. 576-586; *ante*, p. 37, n. 1.

⁴ Wilson's *Rise and Fall of Slave Power in America*, vol. 1, p. 159.

⁵ 11 Pet. 102.

a statute, viewed either as a local regulation of police, or as falling within the quarantine laws, might have been sustained at any period of our constitutional history.

The discussion in the Supreme Court, however, took a wide range. It was urged that goods are the subject of commerce, persons are not. The decision of the court in *Gibbons v. Ogden*, that the Federal power excludes all State action, and in *Brown v. Maryland*, that no State had the right to exclude from its jurisdiction any lawful subjects of commerce, had no bearing, it was said, upon the case at bar.

"How can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods."¹ The judgment of the court sustained the statute in question.

In 1848 the well-known *Passenger Cases*² came before the court. These cases involved the validity of a State law requiring masters of vessels engaged in foreign commerce to pay a certain sum to a State official on account of every alien passenger brought from a foreign country into the State, payment to be made before landing the passenger. The principle of State jurisdiction to exclude foreigners was therefore distinctly asserted, and was necessarily presented to the Supreme Court for decision. In its political relations, the importance of the question had increased in the eleven years which had elapsed since the decision of *New York v. Miln*, and had long since passed from the realm of argument to take its place among the questions which must be settled by the irrepressible conflict. Of the nine members of the court eight rendered separate opinions; the result being that the State tax was declared invalid. It was held by the five justices constituting a majority of the court that the Federal commercial power included intercourse of persons as well as

¹ *New York v. Miln*, 11 Pet. 102, ² 7 How. 283.

the transportation of merchandise, and that State legislation which imposed a burden upon transportation of persons was in conflict with the Federal commercial power.

"It is not a disputable point," said Mr. Justice Wayne, "that under the power given to congress to lay and collect taxes, duties, imposts and excises, it may, in the exercise of its power to regulate commerce, tax persons as well as things;"¹ and it was argued that the extent of the Federal power marked the limitation of the power of the States. From this judgment four judges dissented.

Mr. Chief Justice Taney in his dissenting opinion considered that the question involved in the case had long ago been settled.

"If the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of congress invading this right and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce.

"I had supposed this question not now open to dispute. It was distinctly decided in *Holmes v. Jennison*, 14 Pet. 540; *Groves v. Slaughter*, 15 Pet. 449, and in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539.

"If these cases are to stand, the right of the State is undoubted. And it is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering."²

It had been argued that the power to regulate commerce was the power to regulate commercial intercourse. This, said Mr. Chief Justice Taney, was but an unmeaning varia-

¹ 7 How. 421.

ton, 5 Tex. 426; *State v. Railway Co.*,

² 7 How. 466. *Conf. Smith v. Mars-* 30 N. J. L. 478.

tion of words. "Intercourse" does not appear in the Constitution, and nothing can be gained by substituting it for the word "commerce."

The relation of the question at issue to the political questions of the day is seen in the immediate application of Mr. Chief Justice Taney's argument to some phases of the Kansas-Nebraska struggle. Northern immigrants began at an early period of that struggle to move into the new territory in numbers that promised to make Kansas a free State, unless this immigration could be stopped. The interruption was attempted by force, and it was not long before many avenues of approach were occupied by border ruffians whose business it was to prevent free-soil immigration.

It was in this state of affairs that President Pierce, in 1856, called a special session of Congress that an appropriation might be made for support of the army. The bill introduced into the House for this purpose contained a proviso looking to the use by the President of Federal troops to protect persons and property in Kansas, and upon the national highways leading thereto, from unlawful searches and seizures. The debate in the Senate upon this proviso was long and bitter. The national highways leading to Kansas extended through every State in the Union. "There are in Massachusetts," said Senator Cass, "national highways leading to Kansas." A proposition that the Federal power should be extended over such roads had never before been heard. What right has the President to go into Missouri, Iowa, Illinois or Indiana, upon the highways, and say: 'This is a national highway that leads to Kansas; here I put my soldiers?' The State of Missouri protects individuals on the highways of Missouri, and you have no more right to go there and interfere with her than the English Parliament or the English Government has."¹

The same position was taken by Senator Toucey of Con-

¹Speech of Senator Cass, August 23, 1856, Congressional Globe, 34th Congress, 2d Session, pp. 12, 13.

necticut, who was shortly afterwards made Secretary of War. "If the President can protect persons and property in one portion of the country, can he not in another? Can the President march an army into one of the Southern States, and being of the opinion with some that slavery does not and cannot exist, interfere there and protect persons and property according to these motives?"¹

It would be hard to find an incident illustrating more clearly the incompatibility of slavery and free institutions. No single government could protect both. As long as it was necessary to protect slavery, the commercial development of the country must wait. Free intercourse between the States was impossible.

It was not until after the Civil War that the question next presented itself, and then it was brought before the Supreme Court in *Crandall v. Nevada*.² That case involved the validity of a statute of Nevada laying a tax of one dollar upon every person leaving the State by any railroad, stage-coach or other vehicle engaged in the business of transporting passengers for hire; collection to be made through the owner of the vehicle.

The question, Mr. Justice Miller said in delivering the opinion of the court, was not to be determined by reference to the provision of the Constitution forbidding any State, without the consent of Congress, to lay imposts or duties on imports and exports, nor by reference to that provision which confers on Congress the power to regulate commerce with foreign nations and among the several States. The limitation, it was said, arose from the necessary implications of the whole instrument, and from the rights and duties of the Federal government, its citizens and persons within its jurisdiction. The right to free movement and transportation is, it was said, an essential condition of the operation of the Constitution, beyond the power of any State.

In *Joseph v. Randolph*³ the question concerned the validity

¹ Congressional Globe, 34th Congress, 2d Session, p. 21.

² 6 Wall. 35, reversing 1 Nev. 294.

³ 71 Ala. 499.

of a statute prohibiting the hiring of laborers with a view of taking them out of the State. In deciding against the validity of the statute the court said:

"There can be no denial of the general proposition that every citizen of the United States, and every citizen of each State of the Union, as an attribute of personal liberty, has the right ordinarily, of free transit from, or through the territory of any State. This freedom of egress or ingress is guaranteed to all by the clearest implications of the Federal, as well as of the State constitution. . . . This liberty of interstate transit, thus based on the assertion of personal liberty, is referable to many clauses of the Federal Constitution."

In *Ward v. Maryland*¹ it was claimed by Mr. Justice Clifford as one of the privileges and immunities of the citizens of the several States, guaranteed to the citizens of each State by article 4, section 2, of the Constitution of the United States. In the *Passenger Cases* it was recognized by a majority of the Supreme Court of the United States as a right protected by and included in the commerce clause of the Constitution from hostile State legislation, and its existence was admitted by all and denied by none.²

Since the decision of *Crandall v. Nevada*, the same question has been presented a number of times to the Supreme Court, and it may now be regarded as settled that a State tax upon a traveler, whether passing from State to State, or between the United States and a foreign country, is in conflict with the Federal commercial power.³

A State cannot impose such a tax, though the proceeds be used to defray expenses of inspection⁴ or to keep out unfit immigrants;⁵ and though the tax is laid on immigrants incompetent to become citizens.⁶ A State cannot impose a tax

¹ 12 Wall. 418-430.

² *Clark v. Philadelphia, etc. R. R. Co.*, 4 Houst. (Del.) 158.

³ *Conf. People v. Brooks*, 4 Denio, 469.

⁴ *People v. Compagnie Générale*

Transatlantique, 107 U. S. 59; *People v. Edye*, 11 Daly, 182.

⁵ *People v. Compagnie Générale Transatlantique*, 107 U. S. 59.

⁶ *People v. Downer*, 7 Cal. 169.

on contracts for foreign carriage of passengers,¹ or a tax on interstate passengers.²

In *Henderson v. The Mayor of New York*,³ the court, after brief reference to the *Passenger Cases* and the diversity of views therein expressed, entered upon a general consideration of the commercial power over travelers, as though the question were then open. The statute involved was a modification of the one which had been before the court in the *Miln* case and in the *Passenger Cases*, but instead of requiring from the master of a vessel a payment for each passenger landed, it required that the master or owner give a bond for every passenger landed in the city of New York, in the penal sum of \$300, conditioned to indemnify the commissioners of immigration, and every municipality in the State, against any expense for the relief or support of the person named in the bond, for four years thereafter; the owner or consignee having the right, however, to commute for such bond within twenty-four hours after the landing of the passenger by the payment of \$1.50. This statute the court held unconstitutional. It had already been announced in *United States v. Holliday* that commerce with foreign nations is commerce between citizens of the United States and citizens or subjects of foreign governments. This necessarily involved trade and intercourse between nations and parts of nations. Since the case of *Gibbons v. Ogden*, transportation of passengers from European ports to the United States had assumed a magnitude and importance of vast extent. The immigrants brought wealth, and still more largely the labor which the country needed. Regulation of this great trade could not be considered as other than a regulation of commerce.

The same decision was made in *Chy Lung v. Freeman*,⁴ and in that case the court said that the implications of the

¹ *People v. Raymond*, 34 Cal. 492. L. 581, reversing *State v. Delaware*,

² *Clark, Treas. v. Philadelphia*, etc. R. Co., 80 N. J. L. 473.

etc. R. Co., 4 Houst. (Del.) 158; *Delaware*, etc. R. Co. v. *State*, 81 N. J. L. 581; *Erie Ry. Co. v. State*, 81 N. J.

³ 92 U. S. 259.

⁴ 92 U. S. 275.

Constitution placing foreign commerce within Federal control were as clear as those placing interstate commerce within that control. The statute in question was an enactment of California, not applying equally to all passengers, but applying to specific classes of passengers physically or morally unfit for admission to the country. As the act was drawn, the court said, a commissioner had but to go aboard a vessel filled with passengers, and, without trial, to point to twenty or a hundred persons and say to the master, "These are idiots or criminals. I have here a hundred blank forms of bonds printed. I require you to fill me up and sign each of these for \$500 in gold, and that you furnish me two hundred different men, residents of this State, and of sufficient means, as sureties on these bonds." If the master was unwilling to do this, the necessity for the bond could be commuted by a small payment in cash.

Individual foreigners, however distinguished at home, would be helpless before such a commissioner, and it was within the power of a single, silly, obstinate or wicked officer to bring upon the country the enmity of a powerful nation, or the loss of an equally powerful friend. Cases might readily arise which would be the subject of international inquiry, if not of a direct claim for redress by a foreign nation. Such a claim would fall, not upon the State by which the passenger might have been excluded, but would be made upon the government of the United States. If that government should get into a difficulty which would lead to war or to a suspension of intercourse, the Nation would suffer, and not the State alone. Or, if it were concluded that payment of a pecuniary indemnity was necessary for satisfaction of the injury, the burden would fall upon the Federal government. - The States have been forbidden to hold negotiations with foreign nations or to declare war, and all these relations have been assumed by the United States. The Constitution is not an instrument which leaves it in the power of the States to pass laws whose enforcement renders the general government liable for just reclamations, while

it fails to prohibit to the States the acts for which the United States is responsible.¹

The latter argument was developed in the *Head Money Cases*² and in the *Chinese Exclusion Case*,³ where it was held that Congress had authority to tax or to exclude foreigners, whenever in the judgment of the Federal government the public interests required such exclusion.

TAXATION UPON PROPERTY IN TRANSIT.

In some early cases it was held a State could impose a tonnage tax on interstate freight,⁴ and that it could require charges for carriage of domestic freight to be reduced to the extent of a tonnage tax laid on all freight, though the object of the statute was to discriminate in favor of domestic traffic.⁵

This question of the right of the State to tax the carrier on account of the thing carried was first directly involved in the Federal Supreme Court in the case of the *State Freight Tax*.⁶ On the part of the State it was argued that the railroad owed its existence to the pleasure of the State of Pennsylvania. No consideration of interstate traffic could have compelled the State to authorize its erection, and so far as the Federal commerce power was concerned the State could destroy the road and forfeit its franchises. If, then, it was said, the State could refuse to create, and if it could destroy, why could it not tax for existence? A tax upon a corporation of a certain sum for every ton of freight carried establishes no rule governing intercourse between States. It neither regulates the carrier, the shipper, the purchaser, nor

¹ *People v. Downer*, 7 Cal. 169; *People v. Edye*, 11 Daly, 182. See *People v. Compagnie Transatlantique*, 107 U. S. 59.

² 112 U. S. 580; 18 Fed. Rep. 135, and note at end of case.

³ 180 U. S. 581.

⁴ *Pennsylvania R. Co. v. Common-*

wealth, 3 Grant's Cases (Pa.), 128; *Tonnage Tax Cases*, 62 Pa. St. 286; *Commonwealth v. Monongahela Navigation Co.*, 2 Pearson, 372; *State v. N. Y. & E. R. Co.*, 30 N. J. L. 473.

⁵ *Shipper v. Pennsylvania R. R. Co.*, 47 Pa. St. 338.

⁶ 15 Wall. 232.

the goods transported. Its sole effect is to make the profits of the transporter less.

In passing upon these arguments the court held that the tax was in substance a tax upon goods in transit, quoting Chancellor Bates of Delaware, in *Clarke v. Philadelphia, Wilmington & Baltimore R. R. Co.*,¹ who said of a similar law that it made the position of the carrier substantially "that of one to whom public taxes are farmed out,—and who undertakes by contract to advance to the Government a required revenue, with power by suit or distress to collect the like amount out of those upon whom the tax is laid." In the present case this tax fell upon goods which were in process of transportation from State to State. If this jurisdiction existed at all there would be no limit to the rate of taxation which could be imposed. The same power that might impose a tax of two cents per ton upon coal carried out of the State might impose one of five dollars, and in either event the imposition, large or small, would be a restraint upon the right to have the subjects of commerce pass freely from one State to another without obstruction. It would hardly be denied that custom-houses on the State frontier laying a duty upon the entry or departure of merchandise would be a regulation of commerce, and it was difficult to see any substantial difference between that case and the taxation of goods in transit.

It was conceded that a State could tax the franchises of its corporations and the right of owners of artificial highways, whether such owner be the State or the grantee of franchises from the State. But the tax in question was not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It was laid upon those who deal with the owners of the highways or means of conveyance. The State is not the owner of the roadways nor of the motive power, and the tax is not a compensation for the services rendered by the State or by its agents. Tolls and freights are a compensation for services

¹ 4 Houst. (Del.) 158.

rendered or facilities furnished by the transportation company to a passenger or a shipper. The State, then, has no more power to demand a portion of these tolls than it would have to demand a portion of the rents of land which it had sold.

The court regarded it, therefore, as established that a State cannot tax freight transported from one State to another, or the carrier because of such transportation. This decision has been adhered to with very little variation.¹

A Territory cannot lay a capitation tax on live-stock leaving or entering its boundaries,² nor can a State impose a specific tax on telegraph messages transmitted without the State.³ But where dealers in cattle, most of which are received from other States, and sold for shipment to foreign countries, hold them temporarily after their transportation into the State and before sale and reshipment, they may be taxed on their average holdings.⁴

Wood being floated on a river from one State to another cannot be taxed by authority of one of the States,⁵ though under form of a toll.⁶

The fact that transit to the point of destination may be interrupted does not of itself bring the property within the taxing power of the State so long as the stoppage is temporary and the original movement is not abandoned.⁷

Logs carried to another State, where they are temporarily detained awaiting floatage through it to destination, cannot be taxed in that State.⁸

¹ *Erie R. R. Co. v. State*, 31 N. J. L. 531; *Commonwealth v. Erie R. R. Co.*, 1 Pearson, 345; *Commonwealth v. Delaware, L. & W. R. Co.*, 1 Pearson, 356; *Commonwealth v. Philadelphia & Reading Ry. Co.*, 1 Pearson, 379; *State v. Cumberland & P. R. Co.*, 40 Md. 23; *Jackson Mining Co. v. Auditor-General*, 33 Mich. 488.

² *Farris v. Henderson*, 1 Okl. 384.

³ *Telegraph Co. v. Pennsylvania*,

128 U. S. 39; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Telegraph Co. v. Texas*, 105 U. S. 460.

⁴ *Myers v. Commissioners of Baltimore County*, 33 Md. 385.

⁵ *Conley v. Chedic*, 7 Nev. 386.

⁶ *Carson River Lumber Co. v. Patterson*, 33 Cal. 334.

⁷ *State v. Carrigan*, 10 Vroom, 35; *Ogilvie v. Crawford County*, 2 McCrary, 143.

⁸ *Coe v. Errol*, 62 N. H. 308. See

It has been held that coal mined in a State and started to another State, but stopped for separation and assortment, cannot be taxed while so detained.¹

The general rule is, however, that when goods are held for any other purpose than for transportation, the transit has ceased. Thus, coal sent by river from Pennsylvania to Louisiana, which, on arrival in Louisiana, was kept on the boats by which it had been transported, and offered for sale and part sold, was subject to State taxation.²

Staves purchased by a foreign corporation, but held before shipment to receive a finishing process, are subject to taxation, and cannot be considered as in transit.³ So where a lumber company towed logs in rafts from Wisconsin, and stopped them in a bayou of the Mississippi river in Illinois, where they were commonly held for several months, and afterwards sent to the mills of the company in another State, it was held that the logs were subject to taxation by the State of Illinois.⁴

A State cannot refuse to permit any proper subject of commerce to enter or leave its territory;⁵ nor can it impose a tax upon the act of entering or leaving;⁶ nor can it impose any conditions upon that right.⁷

116 U. S. 517; *Conn. River Lumber Co. v. Columbia*, 62 N. H. 286.

¹*State ex rel. v. Engle*, 34 N. J. L. 425.

²*Pittsburg & Southern Coal Co. v. Bates*, 40 La. Ann. 226, 156 U. S. 577. See *Brown v. Houston*, 33 La. 842; s. c., 114 U. S. 622.

³*Standard Oil Co. v. Combs*, 96 Ind. 179.

⁴*Burlington Lumber Co. v. Willetts*, 118 Ill. 559.

⁵*Bowman v. Railway Co.*, 125 U. S. 465; *Western Union Tel. Co.*

v. Texas, 105 U. S. 460; *Crandall v. Nevada*, 6 Wall. 35; *People v. Downer*, 7 Cal. 169; *Salzenstein v. Mavis*, 91 Ill. 391; *State v. Indiana & Ohio Oil Co.*, 133 Ind. 69; *Coe v. Errol*, 62 N. H. 303; *Jackson Mining Co. v. Auditor-General*, 32 Mich. 488; *Clarke v. Philadelphia, etc. Co.*, 4 Houst. 158.

⁶*New York v. Compagnie, etc. Co.*, 107 U. S. 59; *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. The Mayor*, 92 U. S. 259; *Brown v. Maryland*, 12 Wheat. 419; *New*

⁷*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, revers-

ing N. & W. R. R. Co. v. Commonwealth, 114 Pa. St. 266.

As applied to vessels, such a tax is forbidden as well by the constitutional prohibition upon the States to lay any duty of tonnage as by the commerce clause of the Constitution.¹

A State law requiring all vessels arriving at a port to pay at a certain rate,² or authorizing port wardens to demand a certain sum for every vessel arriving in the port, whether they are called on to perform service or not,³ or imposing duties on all steam vessels mooring or landing in any part of a port,⁴ is a duty of tonnage, and as such is unconstitutional.

TAXATION UPON PROPERTY WITHIN THE STATE.

A State may tax all property which has a situs within its limits, regardless of the fact that it may have come from, or is destined to, foreign countries, or another State.⁵

The purpose of the commerce clause is to give all lawful products of each State free entrance to the markets of the world. Once brought into market, they can be subjected to no burdens and claim no privileges by reason of their origin.

York v. Miln, 11 Pet. 102; *Passenger Cases*, 7 How. 283; *People v. Pacific Mail S. S. Co.*, 16 Fed. Rep. 344; *Joseph v. Randolph*, 71 Ala. 499; *Carson River Lumber Co. v. Patterson*, 33 Cal. 334; *People v. Downer*, 7 Cal. 169; *Webb v. Dunn*, 18 Fla. 721; *State v. Cumberland & P. R. Co.*, 40 Md. 22; *Mining Co. v. Auditor-General*, 32 Mich. 488; *Conley v. Chedid*, 7 Nev. 386; *Erie Ry. Co. v. State*, 31 N. J. L. 531; *Farris v. Henderson*, 1 Okl. 384; *Commonwealth v. Railroad Co.*, 1 Pearson, 379. *Conf. People v. Edye*, 11 Daly, 132.

¹*Transportation Co. v. Parkersburg*, 107 U. S. 691.

²*Peete v. Morgan*, 19 Wall. 531; *Steamship Co. v. Tinker*, 94 U. S. 238; *Harbor Commissioners v. Pashley*, 19 S. C. 315.

³*Steamship Co. v. Port Wardens*, 6 Wall. 31; *Hackley v. Geraghty*, 34 N. J. L. 332.

⁴*Cannon v. New Orleans*, 20 Wall. 577; *Alexander v. Railroad Co.*, 3 Strobb. (S. C.) 594; *Webb v. Dunn*, 18 Fla. 721; *ante*, pp. 195, 200.

⁵*Coe v. Errol*, 116 U. S. 517; *Brown v. Houston*, 114 U. S. 632; *Standard Oil Co. v. Combs*, 96 Ind. 179; *Rieman v. Shepard*, 27 Ind. 288; *Carrier v. Gordon*, 21 Ohio St. 605.

The rule of transportation, then, is entire freedom from burdens or restrictions imposed by a State. When transportation has ceased, when goods have actually entered the markets of the world, and competition with other commodities in those markets has begun, the rule no longer requires absolute freedom from State regulation. The purpose of transportation is to meet commercial competition, and free competition upon equal terms is the full extent of the constitutional protection. An equal tax upon property which has acquired a situs within the State does not, in any proper sense, interfere with the transactions of commerce.

A large part of the commodities which are sold in every community are brought from other States, and many of these commodities are in competition with goods produced within the State. To hold that a tax could be laid only on domestic articles would give foreign goods an exemption from burdens which are necessarily borne by all other property within the State, and would drive the domestic goods from the market. The general course of decisions has supported this view, and has sustained taxation of goods brought from other States, if taxed like all other property in the State.¹

In the application of this rule a distinction was early made, however, between taxation of goods imported from foreign countries and those brought from other States,² the imported goods in first hands and original packages not being subject to State taxation,³ while goods brought from other States were.⁴

¹ *Pittsburgh, etc. Coal Co. v. Bates*, 156 U. S. 577, 40 La. Ann. 226; *Brown v. Houston*, 114 U. S. 622; *Woodruff v. Parham*, 8 Wall. 123.

² *Cook v. Pennsylvania*, 97 U. S. 566; *Brown v. Maryland*, 12 Wheat. 419-446; *Gelpi v. Schenck*, 48 La. Ann. 535.

³ *Low v. Austin*, 13 Wall. 29; *Gelpi v. Schenck*, 48 La. Ann. 535; *State ex rel. v. Board of Assessors*, 46 La. Ann. 145; *People v. Moring*, 3 Abb. Dec. 539.

⁴ *Pittsburg, etc. Coal Co. v. Bates*, 156 U. S. 577, 40 La. Ann. 226; *Brown v. Houston*, 114 U. S. 622; *Tracy & Wohrendroff v. State*, 3 Mo. 3; *Hinson v. Lott*, 8 Wall. 148; *Woodruff v. Parham*, 8 Wall. 123; *Ex parte Hansen*, 28 Fed. Rep. 127; *Huddleston, Hubbard & Co. v. Hagerty*, 2 Ohio, N. P. 291. *Conf. Hinson v. Lott*, 40 Ala. 123.

"The conditions attending the sale of commodities imported from foreign countries and of goods brought into one State from the others are widely different. It would be impossible for a merchant dealing only in foreign imports in the original package, to compete in general business with one who kept both foreign and domestic articles for sale. He would be limited to a few lines of goods and, with regard to those, cost of transportation, and, above all, duties and imports would reduce him to an equality with the merchant buying his goods nearer at home, and paying no tax on importation."¹

With the development of the absolute rule, however, and the announcement that interstate commerce could not be taxed at all, that it made no difference whether the same tax be laid on domestic commerce, a new question presented itself,—whether the complete immunity from taxation which had, since the decision of *Brown v. Maryland*, belonged to dealers in imported articles, would be also extended to dealers in articles transported from other States. If, as was held in *Leisy v. Hardin* and *Robbins v. Shelby County Taxing District*, no State could exclude a legitimate article of commerce, or impose even a non-discriminating tax upon its sale, what protection would be afforded to the domestic market in each State thus open to competition with untaxed goods? It was clear that at this point there was a practical limitation upon the far-reaching logic of the absolute rule. As between competing goods in the same market, under the same governments, taxed without reference to their origin or destination, discrimination must, in the nature of things, be the test of the validity of State taxation. It is a commercial fact, which no decision could ignore, that in such a case it does make a difference whether the same tax be laid upon domestic commerce. This is the explanation of *Brown v. Houston*,² which was decided at the very period when the

¹Ex parte Brown, 48 Fed. Rep. 2114 U. S. 622.
485, 488.

absolute rule was making itself most strongly felt in the decisions of the court. This case appears in the same volume of reports with the Gloucester Ferry case. It was followed in a very short time by the Bowman case and *Leisy v. Hardin*, and notwithstanding the emphatic announcements in these cases of total want of power in the States to tax interstate commerce, the United States Circuit Court in North Carolina found within a year the same impossible dilemma which had already confronted the Supreme Court, and returned to a construction of the commerce clause by reference to its purpose, sustaining taxation upon articles in original packages, as they had been brought from other States and while in the hands of the consignee,¹ a rule supported by the recent decision of the Supreme Court in *Pittsburg, etc. Coal Co. v. Bates*.²

Such taxation is valid only as it acts upon all property in the State, without discrimination against any on account of foreign origin or use. Where discrimination exists, whether the tax was laid directly or indirectly upon the goods, the sale, or the seller, the law is invalid.³

So in *Myers v. Commissioners of Baltimore County*,⁴ a State tax was sustained which was laid upon an average holding of cattle within the State which had been received during the year from Western States, held by the dealer usually but one day, and sold for export to foreign countries. That these cattle had come from other States and were intended for exportation did not exclude State jurisdiction. They

¹ Ex parte Brown, 48 Fed. Rep. 435.

² 156 U. S. 577.

³ Webber v. Virginia, 108 U. S. 344; Tiernan v. Rinker, 102 U. S. 128; Guy v. Baltimore, 100 U. S. 434; Cook v. Pennsylvania, 97 U. S. 566; Welton v. Missouri, 91 U. S. 275; Ward v. Maryland, 12 Wall. 418; Weil v. Calhoun, 25 Fed. Rep. 865; In re Watson, 15 Fed. Rep. 511; Vines

v. State, 67 Ala. 78; Marshalltown v. Blum, 58 Iowa, 184; Daniel v. Richmond, 78 Ky. 542; State v. Furbush, 72 Me. 498; Jackson Mining Co. v. Auditor, 82 Mich. 488; State v. North, 27 Mo. 484; Van Buren v. Downing, 41 Wis. 122. See Telegraph Co. v. Massachusetts, 125 U. S. 580; State v. Stucker, 58 Iowa, 496.

⁴ 83 Md. 385.

could not be taxed as exports, but, like other property similarly situated with which they were in commercial competition, could be subjected to State taxation.¹

A State may tax capital used in the business of selling imported goods, where it does not appear to be invested in original packages;² and capital which was in money on the date to which the assessment related, though on the date it was actually made the capital was invested in goods which were in interstate or foreign transit;³ and it may tax an instrument of foreign or interstate commerce⁴ if no burden is imposed on account of that use.⁵

A state may tax rolling-stock owned by a corporation of another State, but used in the State in interstate and domestic commerce,⁶ but cannot impose a privilege tax for the use of rolling-stock in interstate traffic.⁷

A State cannot tax the property, situated upon an Indian reservation within its limits, of a person licensed by Federal authority to trade with the Indians.⁸

Property belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed,⁹ or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State if the ascertainment of the amount is

¹ *Hinson v. Lott*, 8 Wall. 148; *Hudleston, Hubbard & Co. v. Hagerty*, 2 Ohio, N. P. 291. Conf. *Hinson v. Lott*, 40 Ala. 123.

² *People ex rel. Luckemeyer v. Coleman*, 61 Hun, 626; affirmed, 133 N. Y. 625. See *Ragnet v. Wade*, 4 Ohio, 107. Conf. *Finney Grocery Co. v. Speed*, 87 Fed. Rep. 408.

³ *People v. Commissioners*, 104 U. S. 466.

⁴ *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Morgan v. Parham*, 16 Wall. 471.

⁵ *Transportation Co. v. Wheeling*, 99 U. S. 273.

⁶ *Marye v. B. & O. Ry. Co.*, 127 U. S. 117; *Reinhardt v. McDonald*, State Treas., 76 Fed. Rep. 403.

⁷ *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Minot v. P. W. & N. Ry. Co.*, 2 Abb. (U. S.) 323; *Minot v. Philadelphia, etc. Ry. Co.*, 18 Wall. 206.

⁸ *Foster v. Board of County Commissioners*, 7 Minn. 140.

⁹ *Union Tow Boat Co. v. Bordelon*, 7 La. Ann. 193; *People v. Tierney*, 57 Hun, 357; *State v. City Council*, 4 Rich. (S. C. L.) 286. Conf. *Commonwealth v. D. & H. C. Co.*, 150 Pa. St. 245.

made dependent in fact on the value of its property situated therein, and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.¹

The rule indicated by these decisions is that taxation on property, instrumentalities or subjects of interstate or foreign commerce is not a regulation of such commerce where the situs of the property is within the limits of the taxing State, and no burden is thereby imposed on transportation or business. But a tax which impedes the operations of commerce, or which is laid directly upon such operations, is a regulation beyond the power of the States.

TAXATION UPON PROPERTY OF FEDERAL CORPORATIONS.

The general rule which leaves within the jurisdiction of each State the property which has a situs therein extends to the property of Federal corporations.

It has been strongly urged that there is a distinction between private corporations performing services for the government and public corporations created to carry on governmental operations. The leading case on this subject is *McCullough v. State of Maryland*.² It was there held that the States may not, by taxation or otherwise, retard, burden or in any manner control the operation of constitutional laws enacted by Congress to carry into execution powers vested in the general government. The jurisdiction of the State, it was said, extends to all subjects within its sovereign power, but those which do not exist by its authority, and which are introduced into its limits without its permission, are not subject to its control or taxation. In the case of *Railroad Co. v. Peniston*³ it was sought to apply these doctrines to the Union Pacific Railway Company, which had

¹ *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688-696; *People ex rel. Platt v. Wemple*, 117 N. Y. 136.

² 4 Wheat. 316.

³ 18 Wall. 5.

been chartered by Congress and had received large aid from the general government, both in donations and loans. Two of its directors were appointed by the President, and it was charged with the performance of important governmental functions. Notwithstanding these facts, it was held that both its real and personal property were subject to State taxation. The majority of the court said that the fact that property within a State belonged to an agent of the Federal government was not sufficient to exempt it from taxation. A large part of the property within the States is necessarily employed in execution of governmental powers. United States mails and other property are carried on almost every railroad. Telegraph lines, steamboats, horses, coaches, street cars and multitudes of manufacturing establishments are employed in the national service. Were they exempt from liability to contribute to the revenue of the States, their governments would be paralyzed. That a corporation derives its charter from Congress does not, so far as concerns exemption of its property from State taxation, distinguish it from other corporations or agencies of the government. The question in every such case is whether taxation is laid upon the means employed by the United States to carry out its powers.

McCullough v. State of Maryland was distinguished upon the ground that the tax there involved was not imposed upon the property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation, performed through the bank as an agent; but even in that case the court carefully limited the effect of the decision, and stated that the doctrine did not apply to a tax upon the real property of the bank in common with other real property in the State.

The same doctrine was stated in *Thompson v. Pacific R. R. Co.*¹ This was the case of a railroad corporation organized

¹ 9 Wall. 572. See *National Bank v. Commonwealth*, 9 Wall. 353, 362.

under the laws of Kansas, but authorized by Congress to construct its line through national territory, and given by the Federal government a grant of lands and a subsidy on the security of a second mortgage. The company was also charged with the performance of certain services to the government. It was held that the property of this road within the State of Kansas was subject to the taxing power of that State. There is a clear distinction, it was said, between the means employed by the government and the property of its agents. Taxation of the agency is taxation of the means. Taxation of the property of the agent is not always, nor generally, taxation of the means, but is a contribution imposed upon all property alike,—a natural obligation from which no property can escape.

But a State or Territory cannot tax franchises granted by Congress for the conduct of interstate transportation. Whether the franchise be one of corporate existence¹ or of corporate powers,² in either event it is beyond the taxing powers of the State.³

TAXATION OF VESSELS.

Ships or vessels enrolled and licensed under the United States statutes, if engaged in commerce on navigable waters of the United States, are ships and vessels of the United States.⁴

It is possible that other vessels, which it is not required to register or enroll, may also fall within this description; as, for instance, flat-boats or barges of the character mentioned in the act of June 30, 1879. *Commonwealth v. American Dredging Co.*⁵ holds that unless unregistered vessels are

¹ *Railroad Co. v. Peniston*, 18 Pac. Ry. Co., 18 Fed. Rep. 385; s. c., Wall 5. 118 U. S. 394; *San Benito County v.*

² *California v. Central Pac. R. R. Co.*, 127 U. S. 1; *Tel. Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *San Francisco v. Tel. Co.*, 96 Cal. 140.

³ *County of Santa Clara v. So.* ⁴ *Transportation Co. v. Wheeling*, 99 U. S. 273-278.

⁵ 122 Pa. St. 386.

permanently located elsewhere they are taxable at the domicile of their owners. The act of 1789¹ requires that every vessel shall be registered in the district to which it belongs, and the third section of the act of 1792 declares that the home port of the vessel shall be that at or near which her owner resides. The question where the home port is depends, therefore, wholly upon the locality of her owner's residence, and not upon the place of her enrollment.² The place of enrollment is, however, a circumstance to be considered in connection with other facts in determining the question of situs.

*Hays v. Pacific Mail S. S. Co.*³ concerned the situs of an ocean steamer owned and registered in New York, but engaged wholly upon the Pacific Ocean, between Panama, San Francisco and ports in Oregon. The steamship company owned a naval dock and ship yards at Benicia, California, and vessels arriving at San Francisco remained no longer than necessary to land their passengers, mails and freight. This was commonly done in one day. They then proceeded to Benicia, and remained for repairs and refitting until the commencement of the next voyage, usually ten or twelve days. It was held that the vessel upon which the question arose had its situs for taxation in New York. If California could impose the tax in question, it was said, any other State into whose ports the vessel entered might also impose a tax. The delay in other ports might not be as great as the delay at San Francisco, but that is determined wholly by accident, depending upon the amount of business to be transacted at the particular port, the extent of necessary repairs, etc. In any event, the vessel would be within the jurisdiction of any State into whose ports she entered temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State or changing her home port.⁴

¹ 1 Stat. L. 55.

⁴ *People ex rel. Pacific Mail S. S.*

² *St. Louis v. Ferry Co.*, 11 Wall. 423-431; *Gunther v. Baltimore*, 55 Md. 457. *Co. v. Commissioners of Taxation*, 58 N. Y. 242; *People v. Niles*, 85 Cal. 282.

³ 17 How. 597.

In *St. Louis v. Ferry Co.*¹ a question arose as to the right of St. Louis to tax vessels which were enrolled at that port. It was shown that they belonged to a corporation of Illinois, and that the minor officers of the ferry company, such as its engineers and pilots, lived in Illinois. The company had, however, an office in St. Louis, where its principal officers lived and where the ordinary business meetings of the directors were held. The boats were, by municipal ordinance, prohibited from remaining at the St. Louis wharf longer than ten minutes at a time. It was held that the enrollment at St. Louis did not fix the situs of the boats at that port, but that, the owner being a corporation of Illinois, the boats must be regarded as having their home port in Illinois at the port nearest the principal office of the corporation in that State, and were not subject to taxation in St. Louis.

A similar decision was rendered in *Graham v. St. Joseph*,² where the question concerned the situs of vessels which belonged to a corporation of Illinois, and plied, except during the winter-time, when they were kept in Michigan, between Chicago, Illinois, and St. Joseph and Benton Harbor, Michigan. In this case it was held that the vessels were taxable only in Illinois.

Situs of a vessel being once fixed is not lost by mere absence and employment elsewhere, but continues until a new situs has been legally acquired.³

In *National Dredging Co. v. State*⁴ a tax was levied by the State of Alabama upon a sea-going tug-boat owned by a corporation of Delaware and registered at the customhouse at Wilmington. It was strongly argued that, under the rule fixing the situs of vessels, the tax in question could

¹ 11 Wall. 423.

² 67 Mich. 652.

³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Morgan v. Parham*, 16 Wall. 471; *The*

Ellen Holgate, 30 Fed. Rep. 125; *City of Newport v. Berry*, 14 Ky. L. R. 29; *Gunther v. Mayor of Baltimore*, 55 Md. 457; *Commonwealth v. Dredging Co.*, 122 Pa. St. 383.

⁴ 99 Ala. 462.

not be sustained. It was shown, however, that the tug-boat, with other property belonging to the dredging company, had long been engaged upon a large dredging contract at Mobile, and that the work would require her continued presence at that place for an indefinite period. The court said, while there were many cases holding that a vessel could be taxed only at the port of registry, nevertheless they all proceeded upon the theory that the vessels were never in a foreign jurisdiction except temporarily, and as an incident to the commerce to which they were devoted. In the case of the steam-tug these considerations did not apply. It was not engaged in commerce, but was used wholly within the State of Alabama, where it was kept not temporarily, but indefinitely. It was therefore held to be a part of the mass of property within the State. The question of situs, it was said, is finally one of fact; and where this fact is shown, neither foreign registry nor foreign ownership can change it.

It is very doubtful whether this case can be reconciled with the Federal law on the subject. No vessel has more than one home port, and that is fixed by the statute at the port nearest the residence of the owner. At that place the vessel must be registered and taxed. A rule which fixes situs at the actual location of the vessel is inconsistent with a rule which disregards actual location and determines situs by reference only to the residence of the owner.¹ It has been argued that national vessels enrolled and licensed under the Federal laws to carry on interstate commerce are not subject to State taxation. It is clear that no duty of tonnage may be laid by any State,² and this constitutional prohibition applies not only to duties measured by the capacity or use of the ship or vessel on which it is laid, but to any tax or duty laid upon the vessel as an instrument of commerce.³

¹ Johnson, Collector, v. Debary- ³ Steamship Co. v. Port Wardens,
Baya Merchants' Line, 37 Fla. 499. 6 Wall 81.

² State Tonnage Tax Cases, 13
Wall 204.

Where no tonnage tax is levied, however, vessels, whether engaged in foreign or interstate commerce, may be taxed by State authority as property, provided that the tax is levied where the vessel has its situs and is valued as other property in the State, without discrimination on account of its employment,¹ and such a tax is not forbidden by the free navigation clause of the Ordinance of 1787.²

A State may impose a tax on capital invested by residents in ships which have their situs in the State, though used in interstate or foreign commerce,³ or capital so invested by its corporations.⁴

TAXATION UPON DOMESTIC COMMERCE.

Domestic commerce which does not cross State lines is subject to State control, and the right of engaging in this commerce may be taxed or otherwise regulated by the State.

The imposition of heavy taxation upon domestic commerce may of course increase the expense of interstate transportation. Carriers are generally compelled to have their agencies and officers and to maintain property within the States through which they operate, whether the business conducted be interstate or interstate and domestic. If, as a result of State legislation, their operation be confined to interstate transportation, this business will be burdened with an expense which would otherwise be divided between the two classes. No case can be found, however, in which State regulation or taxation of purely domestic commerce has been declared invalid for that reason.

The State may not, however, so measure its taxation upon

¹ *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Morgan v. Parham*, 16 Wall. 471; *Hayes v. Pacific Mail S. S. Co.*, 17 How. 596; *Lineham Ry. Transportation Co. v. Pendergrast*, 70 Fed. Rep. 1; *City of Newport v. Berry*, 14 Ky. L. Rep. 29; *Howell v. State*, 3 Gill (Md.), 14.

² *Perrys v. Torrence*, 8 Ohio, 521.

³ *State ex rel. Ravenal v. City Council of Charleston*, 4 Rich. (S. C.) 286.

⁴ *People ex rel. United States & Brazil Steamship Co. v. Commissioners of Taxes and Assessments*, 48 Barb. 157; *Union Tow Boat Co. v. Bordelon*, 7 La. Ann. 192.

domestic carriage as to discriminate against interstate commerce. So in *Express Co. v. Allen*,¹ a license tax laid by the State of Tennessee upon express companies carrying packages from point to point within the State, the tax to be \$1,000 if the lines operated by the company did not exceed one hundred miles in length, and \$3,000 if the mileage operated were longer, was held invalid. It was recognized that the tax might be escaped by refusing to do domestic business, but this, it was said, would not save the statute.

In the absence, however, of any element of discrimination, matters of domestic commerce are not brought within Federal control because of the indirect effect which may result to interstate commerce.²

Furthermore, the fact that domestic business is conducted over military or post roads of the Federal government does not necessarily remove it from State taxation.³

In *Ficklen v. Taxing District*⁴ it seems to have been considered that a State could lawfully require an agreement to pay a tax on total gross receipts, including those derived from interstate business, as a condition for a grant of license to do the business of a broker within the State.

TAXATION UPON CAPITAL STOCK.

A tax upon the capital stock of a corporation at an appraised value falls upon all its property and assets,⁵ including its franchises⁶ and business.⁷ From a purely logical

¹ 39 Fed. Rep. 712; *Commonwealth v. U. S. Express Co.*, 92 Ky. 38. *Contra*, *Knoxville, etc. Ry. Co. v. Harris*, 99 Tenn. 684.

² *Osborne v. Florida*, 164 U. S. 650; *Moore v. City of Eufaula*, 97 Ala. 670; *Alabama G. S. R. Co. v. City of Bessemer*, 113 Ala. 668; *Tel. Co. v. City of Fremont*, 43 Neb. 499; *Tel. Co. v. City of Fremont*, 39 Neb. 692.

³ *Postal Tel. Co. v. Charleston*, 153 U. S. 692; *St. Louis v. Tel. Co.*, 148 U. S. 92; *Tel. Co. v. Charleston*, 56 Fed. Rep. 419; *Moore v. City of Eufaula*, 97 Ala. 670; *Philadelphia v. Tel. Co.*, 67 Hun. 21; *Tel. Co. v. City of Fremont*, 39 Neb. 692, 43 Neb. 499.

⁴ 145 U. S. 1.

⁵ *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, 145, and cases cited; *Bank Tax Case*, 2 Wall. 200.

⁶ *State Railroad Tax Cases*, 92 U. S. 575.

⁷ *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S.

standpoint, therefore, it would follow that such a tax could be imposed only by a government whose jurisdiction extended over each one of the three subjects upon which the tax falls. Jurisdiction is as necessary to valid legislative as to valid judicial action.¹

As a practical fact, however, the rule in regard to taxation of capital stock has not been so strictly applied either in the case of domestic or foreign corporations.

Capital Stock of Domestic Corporations May be Taxed.—

A tax upon the entire capital stock of a corporation engaged in domestic or foreign commerce may be laid by the State under whose law the corporation is chartered. The right of the State to lay such a tax is derived from its personal jurisdiction over the corporation,² and therefore the fact that some of the property of the company is situated in other States, and subject to taxation there, will not invalidate the tax upon its capital stock.³

Tax Upon Capital Stock of Consolidated Corporations.—

The rule which is applied in the case of domestic corporations is also applied to taxation of capital stock of consolidated companies existing under the laws of different States. In *Ashley v. Ryan*⁴ the question concerned the validity of a statute of Ohio requiring payment to the Secretary of State of a fee of one-tenth of one per cent. upon the entire capital stock of a consolidated company existing under the laws of Missouri, Illinois, Michigan and Indiana, as a condition precedent to the grant of charter under the laws of Ohio. In this case the capital stock of the corporations organized in the States outside Ohio amounted to over \$51,000,000, while

138; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 209.

¹ St. Louis v. Wiggins Ferry Co., 11 Wall. 423.

² Maltby v. Reading R. R. Co., 53 Pa. St. 146.

³ State Railroad Tax Cases, 92

U. S. 575; Cable Co. v. Attorney-General, 46 N. J. Eq. 370; State v. Cable Co., 18 Atl. Rep. 581; People v. Steamship Co., 48 Barb. 157; Platt v. Wemple, 52 Hun, 434.

⁴ 153 U. S. 436, 49 Ohio St. 504.

the capital stock of the Ohio corporation amounted to \$700,000 only. In sustaining the tax the court said that the right of incorporation under the laws of Ohio could only be granted by that State, and must depend upon its laws for existence. In seeking to file its articles of incorporation the company was applying for privileges and powers which it could possess only by the grace of the State of Ohio. Having accepted the act of grace, and taken the advantages which sprang from it, the company could not be permitted to claim the privilege or right granted, and at the same time repudiate the condition by performance of which it could alone obtain the privilege which it sought.¹

Capital Stock of Foreign Corporations.—It has been sought to apply this rule to foreign corporations doing business within the State. The capital stock of a company, it has been said, is part of its organic faculty. When a corporation comes into any jurisdiction to do business, it brings with it its whole organization, including its capital stock. A State has the right to prescribe the conditions on which foreign corporations may enter its jurisdiction; and when a corporation comes within a State which levies a tax upon its whole capital stock, it impliedly consents to this condition. As to such a State a corporation is both foreign and domestic. It is an entity, always having the same charter powers and limitations, and, if it can be said to bring any part of its capital within a State, it must necessarily bring the whole. It cannot change its chartered amount of stock at the State line.

As applied to corporations engaged in interstate commerce, this argument has not met the approval of the courts. A corporation, it is held, cannot change its domicile, and it is not accurate to speak of the corporate body itself as entering each State in which it does business. The domicile of a corporation is in the State of its charter; and when it sends

¹See also *Lumberville Bridge* N. J. L. 529. *Conf. Ficklen v. Tax-Co. v. State Board of Assessors*, 55 *ing District*, 145 U. S. 1.

agents to other States to transact business, it no more enters them than any firm or individual changes his domicile by employing foreign agents.

Taxation upon the entire capital stock of foreign corporations engaged in interstate commerce has therefore been held invalid.¹

It is true, however, that a corporation doing business in a foreign State is taxable there to the extent that it has brought its property within the jurisdiction, and the tax may be levied in form upon the capital stock of the company if proportioned to the property within the taxing State.²

This taxation may be based upon the actual valuation of the property within the State,³ or in the case of railroad, telegraph, rolling-stock or express companies, where the property is capable of valuation as a unit, taxation may be apportioned upon a mileage basis, comparing the number of miles operated within the State with those operated without, and levying the tax upon the capital stock in the same proportion.⁴

Taxation may also be laid upon capital stock in proportion to gross or net earnings within the State,⁵ and it has been held a privilege tax can be imposed on a foreign corporation engaged in interstate sales, measured by the amount of capital employed by it in the State;⁶ but, however levied,

¹ Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Aultman et al. v. Holder, 68 Fed. Rep. 467.

² Erie Ry. Co. v. Pennsylvania, 31 Wall. 492; Commonwealth v. Standard Oil Co., 101 Pa. St. 119. Conf. Philadelphia Fire Ass'n v. New York, 119 U. S. 110.

³ People ex rel. Postal Tel. & Cable Co. v. Campbell, 70 Hun, 507.

⁴ Express Co. v. Ohio, 165 U. S. 194, 166 U. S. 185; Telegraph Co. v. Massachusetts, 125 U. S. 580, 141 U. S. 40; Minot v. Railroad Co., 18 Wall. 229; Telegraph Co. v. Poe,

69 Fed. Rep. 557; Sanford v. Poe, 69 Fed. Rep. 546; Telegraph Co. v. Taggart, 141 Ind. 281, 163 U. S. 1; Pullman P. Car Co. v. Pennsylvania, 107 Pa. St. 153, 141 U. S. 18.

⁵ Express Co. v. Seibert, 142 U. S. 339.

⁶ People ex rel. Parke Davis & Co. v. Roberts, Comptroller, 91 Hun, 158; Horn Silver Mining Co. v. New York, 143 U. S. 305; People ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64, affirming 61 Hun, 83.

the tax must be dependent in fact upon the value of the property situated within the State, and the exaction may not exceed the sum which might be leviable directly thereon. Under this rule every corporation is made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not subjected to restrictions or impediments;¹ but a license tax cannot be imposed by a State upon a foreign corporation not maintaining a place of business in the State, which makes interstate sales by traveling agents.² And a foreign corporation engaged in interstate commerce cannot be required to pay a tax on its capital stock employed outside the State.³

TAXATION OF TRANSPORTATION COMPANIES.

With the development of large transportation companies operating through different States new questions have arisen. In the case of coaches or wagons the determination of situs for taxation is not of great importance; and as the local travel driving over State lines is commonly about equal on each side of the line, the rule taxing vehicles at the domicile of the owner ordinarily results in giving each State its fair proportion of revenue.

In the earlier days of railroad transportation this rule could still be applied with substantial fairness. The companies were small; and in many ways closely identified with local interests. As consolidation progressed, however, and the companies grew larger, a new situation was presented. In the first place, the transportation companies are, as to most States in which the question has arisen, of foreign ownership, so that they afford an easy means of extraterritorial taxation; and, in the second place, it has been felt

¹Telegraph Co. v. Adams, 155 U. S. 638, 696. 324; Aultman, Miller & Co. v. Holder, 68 Fed. Rep. 467.

²Coit & Co. v. Sutton, 102 Mich.

³Commonwealth v. Standard Oil Co., 101 Pa. St. 110.

that in many cases the value of their business so much exceeded the value of their property subject to taxation that any tax upon property alone would be inadequate.

The States have sought, therefore, in some manner to tax this business, and to avoid the effect of the rule which limits the taxing power of the State to the property within its jurisdiction.

The business of all transportation companies, it is said, may be regarded, in a sense, as a single homogeneous unit, and their property, wherever situated, so long as used for this business, may also be considered as a unit for purposes of taxation. It is undoubtedly true that all property acquires its value by its capacity for use. Apply, then, this test to railroad, express or telegraph properties, measuring their value by the extent of their use, and a railroad right of way is no longer valued by the acre, like the farms through which it runs, but is fixed at its actual value, determined by actual earnings.

The property of telegraph companies is capable of only one use, and its appraisal must have reference to that use. A right of way which consists of a license to plant a pole in the ground and swing a wire in the air is incapable of valuation as real estate without reference to its use for telegraph purposes.

The same argument applies to express companies and car companies. A large express business may be done with no tangible property but an office desk and a delivery wagon; and for any tax which would seem equal to the amount which the company should pay for the support of the State government, it is necessary to lay something beside this personal property under contribution.

In the case of a car company the argument appears, perhaps, in its strongest light. It may be that none of its cars acquire a situs in the taxing State, and, unless taxation may be made without reference to the property actually located within the State, no tax could be levied upon the car company at all.

There is great force in the argument which is thus advanced to sustain taxation of these companies. It is never possible in appraising property to exclude from consideration its capacity for use. On the other hand, in most cases, it is not important closely to analyze the elements of value. In the case of taxation upon the property of interstate carriers, however, this analysis is necessary, for the property of the carrier is subject to State taxation so long as it is taxed like all other property in the State, while the use to which its property is put is beyond State jurisdiction. It is essential, therefore, that in these cases some distinction be made between the common value of property for ordinary use and the value which is derived from a special use authorized by the Constitution.

It is no answer to this demand to say that the method under consideration is a method of appraisal alone,—that the property which is appraised and taxed is property within the State; for, if the appraised value be made equal to the valuation both of the property and the business in which it is used, the tax laid upon this valuation is a tax on the business.¹

In some cases, when property is of value with reference only to one use, this distinction may be difficult, but there are many cases where it clearly appears.

In *Express Co. v. Ohio*,² for instance, the office desks, delivery wagons, etc., which were taxed had actual ascertainable market value, and when this property was valued at thirteen times that amount and taxed upon that valuation, the burden of the tax fell upon the use to which the property was put.

In *Railway Co. v. Backus*³ it appeared that the mileage of the railway in the three States of Pennsylvania, Ohio and West Virginia was one hundred and seventy-one miles less in the aggregate than its total mileage in Indiana, while its business in the three States named was far more than

¹ Bank Tax Case, 2 Wall. 200.

² 154 U. S. 421.

³ 165 U. S. 194.

twice as much as its business in Indiana. Under these circumstances, a tax levied by Indiana upon the entire capital stock of the railway in proportion to its mileage within and without the State amounted to a tax upon both its property and business.

It is clear, therefore, that the rule by which all the property of interstate carriers is appraised as a single homogeneous unit with reference to its use is not always capable of application without some of the dangers which attend the application of every absolute rule.

History of the Cases.— This method of appraisal was first considered by the Supreme Court in the case of the *Delaware Railroad Tax*.¹ In this case the tax was in form laid upon the capital stock of the railroad in proportion to the mileage within the State. The length of the whole road was, in round numbers, one hundred miles, while the length in Delaware was twenty-four miles. The tax upon the property, estimated according to this ratio, would be in Delaware twenty-four one-hundredths of the tax upon the whole property. It was shown, however, that the value of the property within the State was less than this mathematical proportion of the whole. In passing upon the validity of the tax the court said that, if it were considered as laid upon the property of the corporation, there would be difficulty in sustaining it. The actual character of the tax, however, the court said, was not upon the property, but upon the corporation itself, measured by a percentage of the cash value of a proportionate part of the shares of the capital stock. This taxation, though arbitrary, was approximately just, and was one which the legislature of Delaware was at liberty to adopt.

This case, therefore, falls in line with the *State Railroad Tax Cases*.² In all these cases the tax in question was laid by a State upon corporations of its own creation. In the *State Railroad Tax Cases* the value of the road and all its assets was ascertained by adding together the cash value of

¹ 18 Wall. 206.

² 92 U. S. 575.

the bonds and stock of the company. The result was, as Mr. Justice Miller said, to lay the tax not only upon the tangible property of the company, but also upon the right to use its tangible property in a special manner for the purposes of gain. The franchises of the company, being granted by the State, were subject to this taxation, and the method of appraisement was not open to constitutional objection. "It is therefore obvious," said Mr. Justice Miller, "that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."¹

The result of these cases, however, does not appear to have been considered as changing the rule which entirely excluded from the taxing power of the State the operations of interstate commerce. In the Gloucester Ferry Company case² the court refused to sustain a tax upon the entire capital stock of a foreign corporation on account of its property within the State. The land which the ferry company owned in Pennsylvania could, of course, be taxed as land, but the business of ferriage between States was wholly beyond the jurisdiction of Pennsylvania. The rule was absolute that interstate commerce could not be taxed at all, nor could a method of appraisement be adopted which would involve taxation upon the right of the corporation to use its tangible property in that commerce for the purpose of gain.

Taxation Upon Telegraph and Telephone Properties.—The first modification of this rule appeared in *Telegraph Co. v. Massachusetts*.³ As in most cases making a departure from an established rule, the invasion of principle seemed

¹ 92 U. S. 605. *Conf. Railroad Co. v. Board, etc. of Tennessee*, 85 Fed. Rep. 302. ² 114 U. S. 196, reversing s. c., 98 Pa. St. 105. ³ 125 U. S. 580.

small, and the necessity for some adaptation of the existing doctrine seemed great.

The case arose upon a statute of Massachusetts levying a tax upon the capital stock of the telegraph company, assessed at its market value, in the proportion which its mileage within the State bore to its total mileage. It was true that such a tax as this fell in part upon the company's franchises derived from the commerce clause of the Constitution and from compliance with the act of Congress of 1866. The lines operated by the company were for the most part upon government post roads, and the company had become a government agent. These franchises were undoubtedly beyond the taxing power of the State.

It was also true that the value of the company's capital stock depended largely upon its holdings of property outside Massachusetts, and upon the value of its business and corporate franchises. Its right to maintain offices and land cables in foreign countries, its large holdings of personal property at its principal office, and every contract into which it might enter in other States and countries, contributed to the market value of its capital stock. This property was all beyond State jurisdiction.

It is also clear that an assessment upon capital stock at its market value involved taxation upon the business and upon the corporate and other franchises of the company. The annual earnings of a corporation depend not alone upon the value of its tangible property, but also on the good-will of the business, its volume, and the skill of the management. The elements which unite to produce dividends are not all, or even a majority of them, in the form of tangible property, although they are acquired by investing tangible capital.

It is true of all corporations, as it is of individuals, that their annual profits are the result not of their property only, but of their skill, experience and economy in handling their property. To take the illustrations put by Judge Taft,—it certainly could not be said that the annual profits of a dry-goods store capitalized on a basis of six per cent. would af-

ford a guide to the value of the real estate, merchandise and capital used in business.

“Where the property earns the money as real estate earns rent, or as money loaned earns interest, the earnings do determine very largely the value of the property; but where, as in a business of an individual or a corporation, the investment is active, instead of passive, there is no necessary relation between the value of the tangible property and the earnings. Would any one claim that the value of the presses, type, press franchises, money capital, and office furniture and other tangible property of a newspaper could be determined by its net earnings, or, if it be a corporation, by the market value of its capital stock? Clearly not. And why? Because nearly all its capital has been expended in securing circulation and advertising patronage, or, in other words, good will.” What is true of a newspaper and a dry-goods store is equally true of a telegraph company. Its earnings, and the value of its capital stock, is largely dependent on its good management. Its net earning capacity is also affected by arrangements with railroad companies, and by municipal concessions of the right to use roads and streets. The market value of its capital stock has therefore no necessary or proper relation to the value of the tangible property of the company.¹

This has been frequently recognized in decided cases, that shares of stock may be worth much more than the property of the corporation; that the business may be valuable while the visible capital may have little value and dividends greatly out of proportion to the tangible property.²

Notwithstanding this the tax law of Massachusetts was sustained. It was undoubtedly true that the property of the company in Massachusetts, standing alone and appraised at its actual value as land or personal property, was of small value, and possibly, if State taxation were limited to this

¹ *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449, 457; *Railroad Co. v. Board, etc. of Tennessee*, 85 Fed. Rep. 302; *Pullman's Car Co. v. Central Transp. Co.*, 171 U. S. 138. ² *Union Bank v. State*, 9 Yerg. 490; *Cook v. City of Burlington*, 59 Iowa, 251.

property, the company would escape its fair share of the public burden. It is likely that this consideration weighed largely with the court, as it did afterwards in *Pacific Express Co. v. Seibert*,¹ when the court remarked that the express company "had no tangible property of any consequence subject to taxation" in the State of Missouri, and that, unless some other method of assessment were found, the company would escape its just burden.² Taxation upon capital stock in proportion to mileage was deemed "a rule which, though an arbitrary one, is approximately just,"³ and it was felt, too, that if this rule "were adopted by all the States" . . . "the company would be assessed upon the whole value of its capital stock and no more."

Taxation of capital stock of foreign corporations in proportion to mileage within and without the taxing State was, therefore, established in the case of telegraph companies.⁴

The case in which this rule was announced was, as has been remarked, an extreme one, and it is probable that its character did not then appear as subsequent history has shown it. The rule as stated by the court appeared to be solely a method of appraisement of property within the State. It could therefore be approved without dissent by the same court — with one exception — which decided the *Bowman* case, appearing in the same volume of reports with that case. In *Postal Telegraph Co. v. Adams*, the court, sustaining a privilege tax laid upon a foreign telegraph company for doing business in Mississippi, emphasized the fact that the tax was in substance upon the company's property within the State, and less than it would have been if this property had been subject to a single *ad valorem* tax.⁵

The method of appraisal thus established involved a de-

¹ 143 U. S. 339, 354.

² See *Telegraph Co. v. City of Richmond*, 26 Gratt. 1.

³ *The Delaware Railroad Tax*, 18 Wall. 231.

⁴ *Telegraph Co. v. Taggart*, 163 U. S. 1, 141 Ind. 281; *Massachusetts v. Western Union Tel. Co.*, 141 U. S.

40; *Attorney-General v. Western Union Tel. Co.*, 33 Fed. Rep. 129; *Telegraph Co. v. Norman*, 77 Fed. Rep. 18; *Telegraph Co. v. Poe*, 64 Fed. Rep. 2, 61 Fed. Rep. 449, 470.

⁵ *Telegraph Co. v. Adams*, 155 U. S. 688, 71 Miss. 555.

parture from principle. Telegraph companies, like other concerns engaged in interstate commerce, may not be taxed in respect to their business. Taxation of domestic business has always been permitted,¹ but interstate business has been protected. A State may not tax messages sent from one State to another,² nor can a State tax the whole business of a telegraph company, without distinguishing between domestic and interstate business.³

These propositions are, it is believed, still recognized as law, in case of any direct tax upon messages sent from State to State or upon an interstate business. The rule of apportionment is therefore inconsistent with the principles upon which these cases were decided.

Taxation of Rolling Stock.—The rule of apportionment found its next development in the taxation of rolling stock. The court was no longer unanimous in its decision — Mr. Justice Bradley, who did not participate in the decision of *Telegraph Co. v. Massachusetts*, delivering a strong dissenting opinion, which had the approval also of Mr. Justice Field and Mr. Justice Harlan.

It has long been admitted that a State may not tax property in transit through its borders, because it has no situs in the State;⁴ or a vehicle which, being owned in another State,

¹ *Postal Telegraph Co. v. Charleston*, 153 U. S. 692; *Western Union Tel. Co. v. Charleston*, 56 Fed. Rep. 419; *Moore v. City of Eufaula*, 97 Ala. 670; *Western Union Tel. Co. v. Fremont*, 39 Neb. 692, 48 Neb. 499.

² *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Telegraph Co. v. Texas*, 105 U. S. 480, reversing 55 Tex. 814; *Western Union Tel. Co. v. State*, 62 Tex. 630.

³ *Leloup v. Mobile*, 127 U. S. 640,

reversing 76 Ala. 401; *San Francisco v. Western Union Tel. Co.*, 96 Cal. 140; *Bradford v. Postal Tel. Co.*, 11 Ry. Corp. L. J. 54, Ct. Com. Pl., McKean County, Pa.; *Tel. Co. v. Texas*, 105 U. S. 480, reversing 55 Tex. 814.

⁴ *Morgan v. Parham*, 16 Wall. 471; *Hays v. Pacific Mail S. S. Co.*, 17 How. 597; *Pullman S. Car Co. v. Nolan*, 22 Fed. Rep. 276; *Ogilvie v. Crawford County*, 7 Fed. Rep. 745; *Central R. R. Co. v. Board of Assessors*, 49 N. J. L. 1.

may make a single trip within the taxing State.¹ But may not the rule be different in the case of property which, although owned in another State, is yet kept in continuous and constant use, passing into, out of, or through the State which seeks to subject it to its jurisdiction? Such a case was presented in *Standard Oil Co. v. Batchelor*,² in which it appeared that the plaintiff had been for over a year piling staves near a railroad track, and shipping from the pile. While, therefore, it had maintained a pile of staves within the territory of the taxing State for more than a year, it was impossible to determine whether any particular staves had remained in the State for a longer time than necessary for immediate shipment. The court held that all these staves must be considered as in transit and beyond State jurisdiction.

The case of railway equipment continually employed in transit across State lines presents the same question.

On the one hand, it is said that in such a case the taxing State has no jurisdiction over the person of the owner, nor the business in which the property is employed, nor the property itself. As to the latter, it has come within the State while in the act of transportation performed by virtue of a right secured to its owner, not by authority of State law, but by the exclusive jurisdiction of Congress under the Constitution;³ and while so employed it can never acquire a situs for taxation, no matter how constant or continuous may be its use within the taxing State.⁴

This reasoning was approved in *Bain v. Railroad Co.*⁵ The property in question, it was there said, was not in a

¹ Pullman's P. C. Co. v. Twombly, 29 Fed. Rep. 658-665. See *Coe v. Erroll*, 116 U. S. 517.

² 89 Ind. 1.

³ Pullman So. Car Co. v. Montgomery County, 22 Fed. Rep. 276.

⁴ Hays v. Pacific Mail S. S. Co., 17 How. 596; St. Louis v. Ferry Co., 11 Wall. 425; People v. Niles, 85 Cal. 282; Philadelphia, etc. R. R. Co. v. Ap-

peal Tax Court, 50 Md. 397; Irwin v. Railroad Co., 94 Ill. 105; Appeal Tax Court v. Pullman Co., 50 Md. 452; Pacific R. R. Co. v. Cass County, 58 Mo. 17; Bain v. Railroad Co., 105 N. C. 363; Central R. Co. v. Board, 49 N. J. L. 20. Conf. Dubuque v. Illinois Central R. R. Co., 39 Iowa, 56.

⁵ 105 N. C. 363.

legal sense situated within the State; it was the property of a non-resident corporation, employed and used by it constantly for interstate commerce; it was not stationary, but constantly passing from one State to another. The fact alone that the property of the defendant was continuously within the State did not give the cars a situs there. Their value was always in the State, because of the steady amount of traffic passing over the defendant's road. It is true that such property receives State protection, and has the benefit of its laws, but it is not the subject of taxation, it is said, because the Constitution forbids.

In *Pullman's Palace Car Co. v. Twombly*,¹ Mr. Justice Brewer, then district judge, reached a different conclusion. The duty of the State to protect all property within its limits is clear, and equally clear is its correlative right to tax. Protection involves expenditure, and the tax is the owner's payment therefor. A car which has been used solely within the State may therefore be taxed. If it crosses State lines, the duty of protection remains. Has the right of taxation gone? When an affirmative answer is given to this question, and it is argued that compensation is found in the reciprocity between the States, the relation between the States and the owner is overlooked.

In the case referred to, Mr. Justice Brewer makes a distinction between vehicles of commerce by land and by water. As to the latter, the place in which a vessel is registered is by law its home port and its situs. But as to commerce by land there has been no legislative declaration of equivalent import, and therefore the ordinary principles of taxation must be applied. Vehicles of transportation by land, used constantly and continuously upon a single run, may therefore acquire a situs for taxation, independent of the domicile of the owner; and such situs is not destroyed by the fact that the owner, having many vehicles of like character, and lines in various parts of the country, from time to time

¹ 20 Fed. Rep. 658.

transfers vehicles from one line to another, provided a constant and continuous use is preserved upon a single run.

This case has met with the approval of the Supreme Court.¹

The Gloucester Ferry case, it is said, does not control the decision of the question.

"Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them." . . . "So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."²

In *Pullman's Car Co. v. Pennsylvania*,³ Mr. Justice Bradley, Mr. Justice Field and Mr. Justice Harlan dissented. The cars in question, they said, were in transit like the passengers or freight which they carried, and which also received the benefit of State protection. A tax on passengers or freight would have been invalid, for it would have resulted in discrimination against other States, as was indicated in *Crandall v. Nevada* and in the case of the *State Freight Tax*.

¹ *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Pullman's Car Co. v. Hayward*, 141 U. S. 86; *Pullman's Car Co. v. Commonwealth*, 107 Pa. St. 148. Conf. *Carlisle v. Pullman's Car Co.*, 8 Colo. 320.

² *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 24; *Railroad Co.*

v. Maryland, 21 Wall. 456, 470; *Reinhart v. McDonald*, State Treas., 76 Fed. Rep. 408; *Pullman's Car Co. v. State Board of Assessors*, 55 Fed. Rep. 206, 60 Fed. Rep. 37; *Railway Co. v. Curoh*, 17 Colo. 1.

³ 141 U. S. 18.

In *Hall v. American Refrigerator Transit Co.*,¹ the doctrine of this case was applied to refrigerator cars which were only transiently within the taxing State, and were not run in fixed numbers or under any continuing contract, or at regular times, or even upon an established route, but were furnished in every instance upon the request of shippers or of the carrier acting for the shipper. It was shown, however, that during the year for which the assessment was made the transit company had owned an average of forty cars within the State, and the court held that these cars should be considered as "habitually used and employed" in the State so far as to authorize taxation upon this average holding.

TAXATION OF RAILROAD RIGHT OF WAY.

In some respects the simplest case that can be put is that of taxation upon real estate. It has at all times a recognized value and fixed situs. The land included in a railroad right of way is large enough for many of the common uses to which land is put. If it be in a city, the lot which the railway occupies with its tracks is worth no more than an adjoining lot. In the country the railway land could be used for farming as adjoining land is used, and, if sold, would bring no more per acre.

It has been urged, however, that when land is purchased and used by a railway company, it acquires at once an extrinsic value as part of a whole, and that this value cannot be determined solely by comparison with adjacent town lots or acre property. The right of way, like a bridge, is a whole, having a special value, and all which goes to make up the whole should be taxed upon the valuation which it has thus acquired. The value of all land depends largely upon the use to which it can be put, and, in determining the value of a right of way, it is necessary to look at the elements on which the financial condition of the company depends, and

to consider its traffic as evidenced by its rolling stock and its gross earnings in connection with its capital stock.¹

In *Pittsburg, etc. R. R. Co. v. Backus*,² this method of appraisal was applied to railway property, and a certain proportion of the capital stock, divided with reference to mileage and gross receipts within and without the taxing State, was held to be subject to State taxation. Some emphasis was laid upon the fact that the statute did not require that the valuation of the property within the State should be absolutely determined upon a mileage basis. There might be exceptional cases where terminal facilities in some large city of great value would give to a mile or two in such city a value out of proportion to any similar distance elsewhere on the line of road. Under the statute involved in that case, and which required the appraisers to fix the fair cash value of the railway property, the court said it must be assumed that these elements were duly considered by the appraisers and allowance made therefor.

The case does not in terms sustain taxation upon railway property which extends across State lines, when apportioned according to mileage, or in any other way; but there is probably no reason to suppose that the court intended to qualify the doctrines of *Telegraph Co. v. Massachusetts*, or the other cases which the opinion cites.

An examination of this case suggests doubt whether the assumption of the court that the appraisers had fixed the fair value of the property was in accordance with the facts. It was shown that the mileage of the railroad company in the three States of Pennsylvania, Ohio and West Virginia was one hundred and seventy-one miles less in the aggregate than its total mileage in Indiana. That in those States it owned large and valuable terminal facilities, while it

¹ *Columbus So. Ry. Co. v. Wright*, 151 U. S. 470, 479, 481, affirming *s. c.*, 89 Ga. 574; *Franklin County v. Nashville, etc. Ry. Co.*, 12 Lea (Tenn.), 521-539.

² 154 U. S. 421; *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439; *State v. New York, etc. Ry. Co.*, 60 Conn. 326.

owned none in Indiana, and that its business in those States was more than twice as much as its business in Indiana. Under these circumstances the assumption that these elements were duly considered by the appraisers, and allowance made therefor, seems inconsistent with an apportionment of assets in accordance with mileage. In commenting upon a similar provision of an Ohio statute, Judge Taft said that the courts would not permit injustice to be done to a class of taxpayers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. "It does not help the law any, to point out that the market value of the stock is only to be used to determine the true value in money of the company's Ohio property; and that if, in fact, the value of stock should have no effect in the estimate, we must give controlling weight to the words which embody the standard of value fixed by the constitution. The board is enjoined to determine the value of the property to be taxed, by using as a guide the value of the capital stock and other rules which shall enable them to fix, not the true value in money of the company's property, but its true value in money in proportion to the entire property of the company as determined by the capital stock and other rules. In other words, it is merely a legislative declaration that the true value in money of the entire property of the company is determined by the entire capital stock of the company and other rules, and the true value in money of the Ohio part is merely a proper proportion of the value of the entire property thus determined. The only construction which would eliminate the error of the law is one which would require the board to ignore the market value of the shares as an element of value. . . . Certain it is, that courts will not permit injustice to be done to a class of taxpayers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers, when they come to enforce it. Either the law means what the officers construe it to mean, and its

validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it."¹

TAXATION UPON BRIDGES.

It has been generally held that bridges spanning waters between States are subject to taxation in each State upon that portion which is within its territorial jurisdiction. It is no defense to an action for such taxation that the property of the bridge company is used entirely for interstate business, and that the value of its franchises arises exclusively from its business.²

The taxing power of the State ends, however, with its territorial limits.³

Where a company was incorporated by New Jersey and Pennsylvania to construct and maintain a bridge across the Delaware river, a tax imposed by New Jersey upon the corporate franchise granted by it, levied upon the entire capital stock of the company, was sustained.⁴

The territorial limits and jurisdiction of Virginia, after granting the Northwest Territory to the Federal government, extended to low-water mark on the north side of the Ohio river. Kentucky being subsequently erected as a separate State succeeded to the rights of Virginia, and may tax that part of a bridge over the Ohio river at Louisville, south of low-water mark on the north side of the river.⁵

It is permissible, in determining the value of a bridge as in determining the value of all other property, to consider its capacity for use. In *Railway Co. v. Backus*⁶ the court put the case of two bridges over the Ohio river, of equal cost, one bridge extending between Cincinnati and

¹ *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449, 463; *Cummings v. Bank*, 101 U. S. 153.

² *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150.

³ See *St. Louis Bridge Co. v. City of East St. Louis*, 121 Ill. 238.

⁴ *Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. L. 529.

⁵ *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189. See *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679.

⁶ 154 U. S. 439, 446.

Newport, and another twenty miles below, where there is but a small village on either shore. The value of one of these bridges, it was said, will manifestly be greater than that of the other, and the excess of value will spring solely from its larger use. It would be impossible for an assessing board to eliminate from consideration the value which flows from the use and to place the assessment at the sum remaining.

Taxation of Express Companies.—Attention has been called to the fact that where property extending within and without a State has been considered a unit, and the property within the State valued as a part of this unit, it was required that the method of apportionment adopted should not be such as to permit the appraisal to exceed the actual value of the property within the State. In *Delaware Railway Tax*,¹ the tax, which would have been invalid if levied upon tangible property, was sustained because it was laid upon corporate franchises derived from the State which laid the tax. In *Pittsburg, etc. Ry. Co. v. Backus*² and *Cleveland, etc. Ry. Co. v. Backus*,³ an appraisal of a railroad property within and without Indiana was sustained because the statute did not require that the valuation of the property within the State be made upon the basis of mileage alone, but that mileage and value of capital stock and other elements of value should be considered in appraising the property actually within the State.

In *Adams Express Co. v. Ohio*⁴ these limitations were abandoned. In that case the express companies were required to make a return to the Auditor of State, setting forth, among other things, the total number of shares of capital stock, and their par and market value at the date of the return; also, a statement of their entire real and personal

¹ 18 Wall. 206.

² 154 U. S. 421.

³ 154 U. S. 489; *Indianapolis, etc. Ry. Co. v. Backus*, 133 Ind. 609;

Cleveland, etc. Ry. Co. v. Backus, 133 Ind. 518.

⁴ 165 U. S. 194, 166 U. S. 185.

property within the State, its location and value as assessed for taxation. They were further required to declare their entire gross receipts from whatever source, and of the business done in Ohio, giving the receipts of each office in the State, also the whole length of lines of rail and water routes over which the companies did business, both within and without the State. The board of appraisement was required, in determining the assessment of the companies, to be guided by the value of the property as determined by their entire capital stock, and by such other evidence as would enable it to arrive at the true value in money of the entire property of the companies in Ohio, in the proportion which it bore to the entire property of the companies, as determined by the value of their capital stock and other evidence.

It was shown that the properties of the express companies within Ohio consisted chiefly of personal chattels, such as horses, wagons, harnesses, some office furniture, and a small amount of real estate occupied by stables. All this property differed from property capable of only one use, such as a telegraph right of way, and could have been used as the express companies used it by any purchaser. The value of an office desk is the same whoever uses it, and cannot be determined by the gross receipts of the person in whose office it stands.

Notwithstanding these facts, the State board of appraisers valued at \$533,000 the property of the Adams Express Company within Ohio, which, if appraised upon the usual basis, was worth \$42,000 only, and the method of valuation which produced this result was approved by the Supreme Court.

The property of the express companies, it was said, lacked the physical unity which belongs to the property of railroads and telegraph companies, but it has the same unity in the use of an entire plant for a specific purpose, and the same elements of value arising therefrom. The cars of the Pullman Car Company do not constitute a physical unity, and yet a tax upon these cars in proportion to the mileage oper-

ated within and without the State of Pennsylvania was sustained.¹

In assessing for taxation express property in a State, it was held that the gross earnings, including those from interstate commerce, could be considered,² together with its total capital stock and its property both within and without the State.³

The value of the intangible property of an express company in a State may be ascertained by dividing the whole value of the company's property in the proportion which the line in the State bears to the length of its entire line.⁴

The property of the express companies and of the car company, the court said, had something more than a unity of ownership. It was not the case of a manufacturing establishment in one State and a store in another. These may be owned by the same person and a profit may be made by operating the two, but the work of each would be separate. In the case of the express company, possession of property distributed through different States is an essential condition of the business. The property is employed for a single specific use, and taken together constitutes but one single plant, made so by the character and necessities of the business.

From this decision four justices dissented.

Mr. Justice White, in delivering the dissenting opinion, referred to the fact that the valuation of the property, in the method adopted, amounted to a valuation of the franchise. This franchise, as was said in *Gloucester Ferry Co. v. Pennsylvania*, might constitute the principal part of the company's property. It was not granted by the State, and, con-

¹ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

² *State ex rel. American Express Co. v. State Board of Assessment and Equalization*, 8 S. D. 838; *United State Express Co. v. Ellyson*, 28 Iowa, 370. See *Western Union Tel. Co. v. Ellyson*, 28 Iowa, 380.

³ *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Sanford v. Poe*, 165 U. S. 194; *Adams Express Co. v. Ohio*

State Auditor, 165 U. S. 194; *Sanford v. Poe*, 69 Fed. Rep. 546; *Adams Express Co. v. Poe*, 64 Fed. Rep. 9; *State ex rel. Poe v. Jones*, 51 Ohio, 492; *State v. Adams Express Co.*, 144 Ind. 549. See *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449.

⁴ *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 166 U. S. 185; *Wells, Fargo & Co. v. Crawford County*, 68 Ark. 576.

sisting of the right to engage in interstate commerce, was beyond State jurisdiction. The result was, in the first place, that Ohio might tax property beyond its limits. Property owned by the express company in New York or Massachusetts would add to the value of the shares of stock of the company, and a certain proportion of this value would be taxed by Ohio; while the same property thus taxed in Ohio was also subject to taxation in New York or Massachusetts, where it was in fact located.

The result of the rule announced would be that neither a corporation nor an individual could go from one State into another for the purpose of there engaging in interstate commerce, without subjecting itself to the certainty of having a proportion of its property situated in other States added to the sum of property, however small, which it may carry into the States where it does business, for purpose of taxation therein. By this system not only is a penalty imposed for going from one State into another, but the conduct of interstate commerce becomes loaded with a burden which threatens its destruction.

The rule of appraisal adopted in this case met much criticism. Like the *Robbins Case*, and *Leisy v. Hardin*, the *Express Cases* are an extreme application of an absolute rule, and it is perhaps not improbable that the result may be to demonstrate again that no absolute rule is capable of application to all circumstances which arise.

Taxation of Receipts.—A State may tax receipts derived from business carried on entirely within its limits,¹ but it may not tax receipts derived from business outside its jurisdiction, where the person or corporation conducting the busi-

¹ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Adams Express Co.*, 2 Ohio (N. P.), 98; *Commonwealth v. Delaware & Lehigh R. Co.*, 142 U. S. 839, 44 Fed. Rep. 810; *H. C. Co.*, 21 W. N. C. 406; *Commonwealth v. N. Y. R. & O. R. Co.*, 182 U. S. 472; *Ratterman v. Telegraph Co.*, 127 U. S. 411; *Ohio v.*

ness is not domiciled in the taxing State and the receipts have not been introduced within its limits so as to become part of its property.

There has been, however, great diversity of views as to the power of the State to tax receipts derived from transportation across State lines.

In the first case on the subject, *State Tax on Gross Receipts*,¹ the court distinguished between a tax upon goods on account of their carriage, and a tax upon the fruits of carriage when reduced to possession and mingled with the other property of the carrier. The tax was laid upon receipts of corporations organized under the laws of Pennsylvania, and was collectible once in six months. The court held that this tax fell upon a fund which had become incorporated with the general mass of property in the State, and that it was valid, as would have been a tax upon imported goods after the package had been broken. The States, it was said, may tax the property, real or personal, of all their corporations, including carrying companies, as they tax similar property belonging to natural persons, and to the same extent. This taxation may be laid upon a valuation or may be an excise, and in exacting an excise tax from their corporations the States are not obliged to impose a fixed sum upon franchises or their value, but may demand a graduated contribution, proportioned either to the value of the privileges granted, to the extent or to the result of their exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution. The tax in question, it was said, was manifestly imposed upon the railroad companies measured in amount by the extent of the business or the degree to which their franchises were exercised. The statute did not look beyond the corporation to those who may have contributed to its treasury. The tax was not levied until after the money received for freights and from other sources of income was actually in possession of the company, and had lost its dis-

tinctive character as freight. Such a tax as this, it was held, fell within the power of the States.

In view of the decision in the case of the *State Freight Tax*¹ which had just been made, "it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of three judges."²

In the dissenting opinion it was said that there was practically no difference between a tax upon transportation and one upon its proceeds. To hold that the tax on freight is within the evil to be remedied by the commerce clause, and that a tax on receipts therefrom is not, is "to keep the word of promise to the ear and break it to the hope."

It was conceded that transportation companies may be taxed in any way that does not necessarily impose a burden upon interstate transportation; but it was said that these companies differ from banking, insurance or manufacturing companies in that, while the latter concerns are only remotely or incidentally connected with commerce, the business of transportation is itself commerce.

In concluding the dissenting opinion Mr. Justice Miller said:

"I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution, I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and

¹ 15 Wall. 232.

² Delaware & Hudson C. Co. v. Commonwealth, 17 Atl. Rep. 175.

the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

"I think the tax on gross receipts is a violation of the Federal Constitution and therefore, void."

A large number of decisions are to be found announcing the doctrine approved by the majority of the court in this case and supporting State taxation of gross receipts.

In *Erie Railway v. Pennsylvania*¹ a State law was sustained which imposed a tax on gross receipts of railroad companies doing business in the State, in the proportion of their mileage within and without the State. In this case the tax was levied upon receipts of a consolidated corporation existing under the laws of Pennsylvania, Maryland and Delaware. There was no discussion of the constitutional question, but the case of *State Tax on Railway Gross Receipts* was followed. A similar decision was made in *Minot v. Railroad Co.*,² where a tax upon net receipts was sustained when levied in proportion to the mileage within and without the State. Many other cases sustained taxation upon receipts of railroad, express, telegraph and other companies engaged in commerce among the States, and upon receipts from sales of imported goods; and this rule seems to have been approved by the Supreme Court as late as 1884, in the case of *Moran v. New Orleans*.³ In 1887 the

¹ 21 Wall. 492.

² 18 Wall. 206.

³ 112 U. S. 69.

Railroad Companies: Buffalo & E. Ry. Co. v. Commonwealth, 15 Wall. 284, 8 Brewst. 386; Commonwealth v. Buffalo & E. Ry. Co., 2

Pearson, 376; *State v. Philadelphia, W. & B. Ry.*, 45 Md. 361.

Express Companies: Walcott v.

People, 17 Mich. 68; Southern Express Co. v. Hood, 15 Rich. (S. C.) 66; American Union Express Co. v. City of St. Joseph, 66 Mo. 675; Ohio

rule which had so long prevailed was changed, and the case of the *State Tax on Railway Gross Receipts*¹ was considered and questioned. The case announcing the new rule is that of *Steamship Co. v. Pennsylvania*.² That case involved the validity of a tax levied by Pennsylvania upon gross receipts of a steamship company, incorporated under its laws, derived from transportation of persons and property by sea between different States and to and from foreign countries. In holding this tax invalid, the court said that the question was whether the tax upon the receipts amounted to a regulation of, or an interference with, interstate and foreign commerce. It was levied directly upon the receipts derived by the company from its freights and fares for the transportation of persons and goods between different States and countries. "This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress."

Accepting, therefore, the fact as established, that the State

v. Adams Express Co., 2 Ohio (N. P.), 98. See *Indiana v. American Express Co.*, 7 Biss. 227.

Telegraph Companies: *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Western Union Tel. Co. v. Commonwealth*, 110 Pa. St. 405; *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273.

Other Occupations: *Pullman's Car Co. v. Commonwealth*, 107 Pa.

St. 148; *Steamship Co. v. Commonwealth*, 104 Pa. St. 109; *People v. Wilmerding*, 62 Hun, 391; *Padelford v. Mayor of Savannah*, 14 Ga. 438; *People v. Hussey*, 4 Cal. 46; *People v. Coleman*, 4 Cal. 46. Conf. *Cook v. Pennsylvania*, 97 U. S. 566.

¹ 15 Wall. 284.

² 122 U. S. 326, reversing 104 Pa. St. 109. See *Fargo v. Michigan*, 121 U. S. 230.

could not tax the transportation, could the freights and fares received for transportation be constitutionally taxed? Looking at the substance of things, it was difficult to see any difference between such taxes. The one was tantamount to the other, and it was nearer to metaphysics than plain logic for the State officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you are getting for performing it." Such a position can hardly be said to be based on sound reason.

It was not, the court said; within the scope of the discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce might lead. If the power exist in the States at all, it has no limit but their discretion, and might be so exercised as to destroy that commerce, or to load it with a burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs.

The result of this case, then, was to deprive the States of power to tax receipts derived from interstate commerce.

Following this decision, it was held in Indiana that a tax levied upon the gross receipts of a car company in the proportion which the mileage of the company within the State bore to that without was unconstitutional.¹ In Vermont it was also held that receipts from transportation could not be thus taxed.²

The power of the Federal government over interstate commerce, the court said, was exclusive and supreme. The question involved was a Federal one; and while the earlier decisions of the Supreme Court were not harmonious, the later cases had carried the Federal power to the utmost length, and "have much restricted, if, indeed, they have not completely annulled, the police power of the states where inter-

¹ *State v. Pullman's Car Co.*, 16 Fed. Rep. 198; *State v. Woodruff R. Co.*, 63 Vt. 1. Car Co., 114 Ind. 155. ² *Vermont & C. R. Co. v. Vermont*

state questions are involved, and they have, in effect, swept away all state lines."¹

A similar decision was rendered by the United States Circuit Court in the case of *Indiana v. Pullman's Car Co.*,² where it was held the fact that a sum of money was earned in Indiana gives that State no right to tax it in the treasury of the company in Illinois. The statute in question, it was said, was void as an effort to give State law extraterritorial force and to regulate commerce among the States.

The rule prohibiting taxation of receipts has been applied in a large number of cases, and is now "thoroughly established."³

In *Maine v. Grand Trunk Ry. Co.*⁴ we reach the third stage of constitutional doctrine upon this subject, and the rule of apportionment which had been applied to the property of telegraph and car companies is applied to the taxa-

¹ *State v. Woodruff Car Co.*, 114 Ind. 155.

² 16 Fed. Rep. 198.

³ *Railroad Companies*: *New York, etc. R. R. Co. v. Pennsylvania*, 158 U. S. 431, 437; *Delaware & Hudson Canal Co. v. Commonwealth*, 17 Atl. Rep. 175; *Commonwealth v. Delaware, L. & W. Ry. Co.*, 21 W. N. C. 412; *Commonwealth v. Delaware, etc. Ry. Co. (Com. Pl. Dauphin Co., Pa.)*, 21 W. N. C. 406; *Vermont & Canada Ry. Co. v. Vermont Central Co.*, 63 Vt. 1; *Southern Ry. Co. v. City of Ashville*, 69 Fed. Rep. 359; *Delaware, etc. Canal Co. v. Commonwealth*, 1 Mona. 36; *Northern Pacific R. R. Co. v. Barnes*, 2 N. D. 310, 351; *Northern Pacific R. R. Co. v. Strong*, 2 N. D. 395; *Northern Pacific R. R. Co. v. Brewer*, 2 N. D. 396; *Northern Pacific R. R. Co. v. Treasler*, 2 N. D. 397; *Northern Pacific R. R. Co. v. McGinnis*, 4 N. D. 494; *Northern Pacific R. R. Co. v.*

Raymond, 5 N. D. 358. See *Commonwealth v. Lehigh Valley Ry. Co.*, 129 Pa. St. 308; *Lehigh Valley Ry. Co. v. Commonwealth*, 1 Mona. 45.

Express Companies: *Fargo v. Michigan*, 121 U. S. 230, reversing 57 Mich. 598. See *State v. American Express Co.*, 7 Biss. 227.

Telegraph Companies: *Western Union Tel. Co. v. Alabama*, 182 U. S. 472; *Western Union Tel. Co. v. State*, 62 Tex. 680; *In re Taxation of Pennsylvania Tel. Co.*, 48 N. J. Eq. 91.

Car Companies: *State v. Pullman's Palace Car Co.*, 64 Wis. 89; *State v. Woodruff Coach Co.*, 114 Ind. 155.

Other Occupations: *Cook v. Pennsylvania*, 97 U. S. 566; *State of Louisiana v. Kennedy*, 10 La. Ann. 397; *Frere, Sheriff, v. Von Schoeler*, 47 La. Ann. 324.

⁴ 142 U. S. 217.

tion of gross receipts. The statute in question in this case provided that every person operating a railroad within the State should pay to the State Treasurer an annual excise tax for the privilege of exercising its franchises in the State, the amount of the tax to be ascertained by reference to the gross receipts of the company in the proportion of its mileage within and without the State. The statute was upheld on the ground that it was levied upon the railroad company, a foreign corporation, for the privilege of exercising its franchises within the State. It was permissible, the court said, to measure this tax by reference to the receipts of the company, and nothing in this decision, it was said, conflicted with the decision in *Steamship Co. v. Pennsylvania*.¹ It seems clear that the burden of the tax in question fell upon the gross receipts by which the tax was measured. The validity of a tax cannot depend upon the name which is given to it, nor can it be assumed that the ruling of the court in *Steamship Co. v. Pennsylvania* would have been different had the wording of the law there involved been that which the State of Maine subsequently adopted.

In the dissenting opinion it was said that by the decision in that case it was held that taxation may be imposed upon receipts of the company for the exercise of its franchise within the State if graduated according to the mileage. This tax might be levied as upon property. The receipts might also be taxed as upon the franchise. In many other ways the burden might be laid upon them.

"If the interstate commerce of the country is not, or will not be, handicapped by this course of decision," said Mr. Justice Bradley, "I do not understand the ordinary principles which govern human conduct."

The decision in the *Maine Receipts Case* must be regarded as a variation from the rule stated in the *Steamship Co. v. Pennsylvania*. It is no longer true that receipts cannot be taxed, and that so far as this question is concerned the States do not exist. Receipts can be taxed if the rule of ap-

¹ 122 U. S. 326.

portionment be followed. Since the decision in the *Maine Case*, receipts have been referred to, not only as a measure of value of franchises and of real and personal property, but even in addition to all these taxes they have been made subject to a payment for benefits derived from control by a State commission.¹

LICENSE TAXES ON OCCUPATIONS.

The earlier cases made a distinction between taxation upon interstate commerce and upon the occupation of conducting commerce. Occupations carried on within the limits of a State are, it was said, subject to its control and regulation; and while a tax upon those occupations might affect transportation, it was no more a tax upon it than under the rule which then obtained would have been a tax upon receipts derived from transportation. The leading case which announced this doctrine is *Osborne v. Mobile*,² decided in 1872. In this case it was held that an ordinance requiring payment of a fee for a license to transact in Mobile a general express business extending beyond the State was not a regulation of commerce, although the ordinance required a larger payment from interstate than from domestic carriers. In either case, it was said, the tax was imposed upon the business of making contracts within the State. It was true that the contracts were for interstate carriage, but the tax rested upon the business; not upon the carriage. When imposed without discrimination, therefore, such taxes were sustained,³

¹ *Charlotte, etc. Ry. Co. v. Gibbs*, 142 U. S. 896; *Southern Express Co. v. Virginia*, 168 U. S. 705; *New York, etc. R. R. v. Pennsylvania*, 158 U. S. 481; *Pittsburgh, etc. Ry. Co. v. Backus*, 154 U. S. 421; *Tide-Water Pipe Co. v. State Board of Assessors*, 57 N. J. L. 516; *State ex rel. American Express Co. v. State Board of Assessment*, 8 S. D. 888; *People v. Campbell*, 74 Hun, 210. See *Lehigh Valley R. Co. v. Commonwealth*, 1 Mona. 45; *Commonwealth v. Lehigh Valley Co.*, 129 Pa. St. 308.

² 16 Wall. 479, 44 Ala. 493.

³ *Memphis & Little Rock Ry. Co. v. Nolan*, 14 Fed. Rep. 532; *Mobile v. Leloup*, 76 Ala. 401; *Crutcher v. Commonwealth*, 89 Ky. 6; *Lightburne v. Taxing District*, 4 Lea. 219; *Pullman So. Car Co. v. Gaines*, 8 Tenn. Ch. 587; *Tel. Co. v. Richmond*,

but when discrimination appeared they were invalid on that account.¹

In *Moran v. New Orleans*,² decided in 1882, the question was again presented. In the ten years which intervened between the two decisions, the court had greatly extended the Federal commercial power, and the tax which was sustained in the earlier case was declared invalid in the later case. The ordinance upon which the question arose required payment of a license fee by all persons operating tow-boats between the Gulf of Mexico and the city of New Orleans. This tax, the court said, was imposed upon the business of navigating the Mississippi river, and could not be applied to vessels licensed under the Federal laws to carry on the coasting trade. The occupation taxed was that of using the Federal license; acts which the United States declared might be done without the tax, the State attempted to declare could only be done upon payment of the tax. *Osborne v. Mobile* was referred to in the opinion of the court, but no distinction was noticed. The effect was, nevertheless, to question the soundness of the earlier decision, if, indeed, it were not practically overruled. The *Moran Case* was rapidly followed by *Pickard v. Pullman Co.*,³ *Steamship Co. v. Pennsylvania*,⁴ and other cases. In *Robbins v. Shelby County Taxing District*,⁵ *Osborne v. Mobile*, though not cited in the majority opinion, was much relied upon in the dissenting opinion of the Chief Justice, Mr. Justice Field and Mr. Justice Gray. It was not, however, expressly overruled until the decision in *Leloup v. Mobile*.⁶ Ordinary occupations, the court there said, may be taxed in various ways, and in most cases legitimately taxed; but in the case at bar, the business of the telegraph company was that of carrying on interstate commerce, and a State could not tax such a business occupation when

26 Gratt. 1. Conf. Southern Ex. Co. v. Mayor, etc. of Mobile, 49 Ala. 404. See Finney Grocery Co. v. Speed, 87 Fed. Rep. 408; Galveston v. Gorham, 49 Tex. 279; Singer Mfg. Co. v. Wright, 97 Ga. 114.

² 112 U. S. 69.

³ 117 U. S. 84.

⁴ 122 U. S. 326.

⁵ 120 U. S. 489.

⁶ 127 U. S. 640. See *Postal Tel. Co. v. Adams*, 71 Miss. 555.

¹ *Cook v. Pennsylvania*, 97 U. S. 566.

it could not tax the business itself. It was urged that a part of the telegraph business was internal to the State of Alabama, and therefore taxable by it, but this fact, the court said, did not remove the difficulty. The tax affected the whole business without distinction, and such a tax the State could not impose.¹

In *Norfolk & Western Ry. Co. v. Pennsylvania*, it was shown that the railroad company owned a line of road in the States of Virginia and West Virginia, and that by traffic contracts this road had become a link in a through line over which freight and passengers were carried in and out of Pennsylvania. In the conduct of this business the railroad company maintained an office in Philadelphia for the use of its officers, stockholders, agents and employees. The statute in question imposed a tax upon the company for the maintenance of this office. It was not open to question, the court said, that the business of the railroad company was interstate commerce and nothing else. The purpose for which the office was maintained in Pennsylvania was the furtherance of this business. It did not seek to exercise, in that State, any privileges or franchises not immediately connected with interstate commerce, or required for the purpose thereof. A tax upon the maintenance of this office was therefore upon one of the means of the company's commerce, and as such was in violation of the Constitution.² In *McCall v. California*³ the plaintiff in error was agent of a railroad company whose line extended between Chicago and New York. His occupation consisted in soliciting passenger traffic in San Francisco for the road which he represented, and it was claimed on the part of the State that this occupation was subject to its taxation. The court held that the business of the agency was one of the means by which the company sought to increase its interstate pas-

¹ *Telegraph Co. v. Alabama*, 182 U. S. 114, reversing 114 Pa. St. 256; *People v. Roberts*, 50 N. Y. Supp. 855.
² *Telegraph Co. v. Alabama*, 182 U. S. 114, reversing 114 Pa. St. 256; *People v. Roberts*, 50 N. Y. Supp. 855.
³ *McCall v. California*, 136 U. S. 104.

² *Norfolk & Western R. R. Co. v.*

³ 136 U. S. 104.

senger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it was therefore upon the occupation of carrying on interstate commerce, and as such beyond the power of the State. A similar decision was rendered in New York in the case of *People ex rel. Pennsylvania R. R. Co. v. Wemple*.¹ It was shown that the Pennsylvania Railroad Company operated a line of railroad for the transportation of freight and passengers, extending through the State of New Jersey and into other States. No part of its road lay within New York, but it operated, in connection with its road, a ferry from the New Jersey shore across the Hudson river to the city of New York, where it had terminal facilities consisting of wharves, piers, docks and buildings which were used in the transaction of the business of transporting freight and passengers over its line. The only transportation in which it engaged within New York consisted of receiving and delivering freight and passengers to and from that city, the making of contracts for transportation, the sale of passenger tickets, and the employment of a large number of agents by whom this business was conducted. It was held that this business was exclusively interstate commerce. The railroad performed the work of an interior carrier in New Jersey and other States, but in New York its business was that of an interstate carrier exclusively. The tax in question had been held to be upon the corporate franchise or business, and not upon property, and it necessarily followed that it could not be laid upon the railroad company. The general power of a State to tax pursuits and callings carried on within its limits does not extend to the taxation of any business which is conducted solely by authority of a Federal franchise. The same rule was announced in a number of other cases.²

The result of these cases indicates that while at different

¹ 128 N. Y. 1; s. c., 65 Hun, 252, 47; *Ratterman v. Tel. Co.*, 127 U. S. 20 N. Y. Supp. 287. 411; *Webster v. Bell*, 68 Fed. Rep.

² *Crutcher v. Kentucky*, 141 U. S. 183.

times the views of the courts differed as to the character of a certain tax, nevertheless in all cases the principle of law upon which the judgment of the court proceeded was the same — that acts performed under franchises granted by the State are subject to its jurisdiction,¹ but that operations performed under a Federal franchise are wholly beyond State control.

In *Maine v. Grand Trunk Ry. Co.*² this principle was modified by the introduction of the rule of apportionment which we have traced in other fields of taxation. In the Maine case the tax in question was imposed upon every corporation or person operating a railroad within the State, for the privilege of exercising its franchise therein, the amount of the tax to be determined by a proportion of the gross receipts of the company, divided with reference to its mileage within and without the State. It was clear that if the earlier cases were followed such a tax could not be sustained. The fact that it was laid upon the privilege of exercising corporate franchises within the State could not justify it; for, as was said in *Pickard v. Pullman Southern Car Co.*,³ exercise of a constitutional right cannot be made a privilege by State legislation. As a tax upon receipts the statute could not be justified, for receipts derived from interstate transportation were not subject to State taxation;⁴ and the fact that it was imposed upon part only of the receipts was immaterial, for a through rate is a unit and not susceptible of division.⁵ Notwithstanding these facts the court sustained the tax. The doctrine of earlier cases was therefore considerably modified by this case. It cannot be understood, however, that the court intended to hold that acts performed under a Federal franchise were subject to State taxation, or to overrule the *Pickard* case and *Steamship Co. v. Pennsylvania*. If these cases, then, are still to be regarded as correct, some distinction must be found in the facts.

¹ *Osborne v. Florida*, 164 U. S. 650;
Central Pacific R. R. Co. v. California, 162 U. S. 91; *Southern Pacific R. R. Co. v. California*, 162 U. S. 167.

² 142 U. S. 217.

³ 117 U. S. 34.

⁴ *Steamship Co. v. Pennsylvania*, 122 U. S. 326.

⁵ *Wabash R. R. Co. v. Illinois*, 118 U. S. 557.

It is possible that the only substantial difference in the facts is in the extent of the taxation involved. The tax in the Pickard case was for an amount arbitrarily fixed by the State, and in *Steamship Co. v. Pennsylvania* it was laid upon all the receipts of the company; while in *Maine v. Railway Co.* the court emphasized the fact that the tax, being proportioned to the receipts of the business, seemed eminently reasonable and likely to produce satisfactory results, both to the State and to the corporation taxed. If this be the distinction between the cases, the question which is likely to present itself for decision, so long as the Maine case stands, will no longer be entirely a question of State jurisdiction over domestic or Federal franchises, but will be affected, or perhaps determined, by the question whether the method of division adopted is reasonable and likely to produce satisfactory results.

Since this decision there have been a number of cases holding that Federal franchises are beyond State taxation. *Harmon v. Chicago*¹ held that a city ordinance imposing a license tax for the privilege of navigating a river within the limits of a city was unconstitutional. In this case the river had been, from time to time, improved by the city, and it was claimed that the ordinance was in the nature of a toll, or compensation, for the benefit of this improvement. The court held, however, that the license, being exacted for keeping, using or hiring steam tugs, was not compensation for the deepening of the river, and called attention to the fact that it was not shown that any special benefit had arisen to the vessels in question by the deepening which had been made. The license tax was therefore upon the use of boats in interstate commerce, and this was beyond the jurisdiction of the State.²

On the other hand, where a foreign corporation is engaged both in domestic and interstate commerce, its domestic busi-

¹ 147 U. S. 396.

Seibert, 142 U. S. 339; Western

² Postal Tel. Cable Co. v. Charleston, 153 U. S. 692; Express Co. v. Union Tel. Co. v. Alabama, 182 U. S. 472.

ness is subject to regulation by the State in which it is conducted. If a foreign corporation employs its capital in a State and has its protection, there is no reason why it should not be subjected, to the extent of its capital so employed, or under some circumstances to the extent of its whole capital, to State regulation. The tax is not imposed upon its property, but is a condition of the grant of a privilege of doing domestic business as a corporation within the State. In *Horn Silver Mining Co. v. New York* the company maintained an office in New York for its officers and directors and kept bank accounts there; it was subjected to a franchise tax computed by a percentage of its whole capital stock, and this was sustained.¹ In *People ex rel. Southern Cotton Oil Co. v. Wemple*,² it was shown that the relator was organized under the laws of New Jersey. It maintained a sales agency in New York, and imported into that State crude oil, which was there refined and delivered to customers. It also maintained a warehouse in New York for storage of its products, and kept a deposit in New York banks. It was held that this corporation was engaged in a domestic business within the State, and that the franchise of so engaging in business was subject to taxation.

The general rule, therefore, is that license fees may be required for the conduct of domestic business although the licensee may also be engaged in an interstate business,³ but a fee may not be required for the conduct of interstate commerce,⁴ either for selling goods from other States⁵

¹ *Horn Silver Mining Co. v. New York*, 143 U. S. 305.

² 131 N. Y. 64; *State ex rel. Parke v. Roberts*, 91 Hun, 158.

³ *Osborne v. Florida*, 164 U. S. 650, affirming 38 Fla. 162; *Postal Tel. Co. v. Charleston*, 153 U. S. 692; *Gibson County v. Pullman Co.*, 42 Fed. Rep. 572; *Alabama, etc. R. Co. v. City of Bessemer*, 113 Ala. 668; *City of Aniston v. Southern R. R. Co.*, 113 Ala. 557; *Richmond, etc. Ry. Co. v.*

Reidsville, 101 N. C. 404; *Telegraph Co. v. Fremont*, 39 Neb. 692, 43 Neb. 499; *Express Co. v. State*, 55 Ohio St. 69. See *Telegraph Co. v. Mississippi R. R. Commission*, 74 Miss. 80.

⁴ *McCall v. California*, 136 U. S. 104; *Clyde S. S. Co. v. City Council of Charleston*, 76 Fed. Rep. 46; *City of San Bernardino v. Southern Pacific Ry. Co.*, 107 Cal. 524.

⁵ *Brennan v. Titusville*, 153 U. S. 289; *Asher v. Texas*, 128 U. S. 129;

or for purchasing goods for transportation beyond the State.¹

Interstate traffic is free from burdens imposed by State laws. That a person is engaged both in interstate and domestic business does not authorize a State to subject the whole to its regulation. Before domestic business may be taxed it must be separated from that which is foreign and interstate.² In no event can the payment of a tax be made a condition precedent to the right of any person or corporation to engage in interstate commerce.³

After goods have passed from first hands⁴ or after original

Robbins v. Taxing District, 120 U. S. 489; *Ex parte Hough*, 69 Fed. Rep. 330; *In re Mitchell*, 62 Fed. Rep. 576; *In re Rozelle*, 57 Fed. Rep. 155; *In re Flynn*, 57 Fed. Rep. 496; *In re Tyerman*, 48 Fed. Rep. 167; *In re Nichols*, 48 Fed. Rep. 164; *In re Spain*, 47 Fed. Rep. 208; *In re Houston*, 47 Fed. Rep. 539; *In re White*, 43 Fed. Rep. 918; *In re Kimmel*, 41 Fed. Rep. 775; *Ex parte Stockton*, 33 Fed. Rep. 95; *Stratford v. City Council of Montgomery*, 110 Ala. 619; *Ex parte Murray*, 93 Ala. 78; *State of Alabama v. Agee*, 83 Ala. 110; *McClelland v. Mayor, etc. of City of Marietta*, 96 Ga. 749; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754; *City of Bloomington v. Bourland*, 187 Ill. 534; *City of Peoria v. Gugenheim*, 61 Ill. App. 374; *City of Huntington v. Mahan*, 142 Ind. 695; *Martin v. Town of Rosedale*, 130 Ind. 109; *McLaughlin v. City of South Bend*, 126 Ind. 471; *City of Ft. Scott v. Pelton*, 89 Kan. 764; *McClellan v. Pettigrew*, 44 La. Ann. 356; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848; *Overton v. City of Vicksburg*, 70 Miss. 558; *Richardson v. State*, 11 So. Rep. 934; *State v. Bracco*, 103 N. C. 349; *State ex rel. Selliger v. O'Connor*, 5

N. Dak. 629; *Ex parte Rosenblatt*, 19 Nev. 439; *Baxter, Marshall v. Thomas*, 4 Okl. 605; *Hurford v. State*, 91 Tenn. 669; *State v. Scott*, 98 Tenn. 254; *Ex parte Holman*, 36 Tex. Crim. App. 255; *State v. Lichtenstein (W. Va.)*, 28 S. E. Rep. 753; *People v. Roberts*, 47 N. Y. Supp. 949; *Lewis v. Irby Cigar Co. (Tex. Civ. App.)*, 45 S. W. Rep. 476.

¹ *Rothermel v. Meyerle*, 136 Pa. St. 250. See *Rothermel v. Zeigler*, 7 Pa. Co. Ct. Rep. 505.

² *Ratterman v. Telegraph Co.*, 127 U. S. 411; *United States v. Hemingway*, 39 Fed. Rep. 60; *San Bernardino Co. v. Southern Pac. Ry. Co.*, 107 Cal. 524.

³ *Leloup v. Mobile*, 127 U. S. 640; *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Pickard v. Pullman's Car Co.*, 117 U. S. 84; *Moran v. New Orleans*, 112 U. S. 69; *Aultman v. Holder*, 68 Fed. Rep. 487; *City of Bradford v. Telegraph Co.*, 11 Ry. & Cor. L. J. 54 (Ct. Com. Pl., McKean Co., Pa.). *Conf. People ex rel. So. Cotton Oil Co. v. Wemple*, 131 N. Y. 64.

⁴ *Waring v. Mayor*, 8 Wall. 110; *Mayor of Mobile v. Waring*, 41 Ala. 189; *State v. Joyner*, 81 N. C. 534. See *State v. Kibling*, 63 Vt. 636.

packages have been broken,¹ they are considered as mingled with the mass of property in the State, and so long as no discrimination be made against them on account of their origin, their sale may be taxed or prohibited by State law. Discrimination is always prohibited by the commerce clause, and any law which imposes upon the goods or dealers of other States or countries burdens which are not borne by domestic goods or dealers is for this reason unconstitutional,² and Congress cannot authorize such discrimination.³

Upon this ground a State tax is invalid which is laid upon purchases of goods outside the State, but not upon purchases from dealers within the State who have paid an occupation tax.⁴ A license tax upon sale of goods cannot be sustained where the amount of the tax is higher for the sale of goods from other States or countries than for domestic goods;⁵ or where an exception is made in favor of persons having a local place of business;⁶ or where there is an exemption in favor of sales by local citizens;⁷ or where the tax discriminates against imported goods,⁸ or non-residents or foreign

¹ *State v. Parsons*, 124 Mo. 436; *Louisville*, 84 Ky. 306; *Daniel v. Higgins v. Rinker*, 47 Tex. 381, 393; *Trustees*, 78 Ky. 542; *State v. North & Scott*, 27 Mo. 464; *Albertson v. Commonwealth v. Harmel*, 166 Pa. St. 89. See *State v. Kibling*, 63 Vt. 636.

² *Corson v. State of Maryland*, 120 U. S. 502, reversing 57 Md. 251; *Webber v. Virginia*, 108 U. S. 344, reversing 38 Gratt. 898; *Cook v. Pennsylvania*, 97 U. S. 566; *Welton v. Missouri*, 91 U. S. 275, reversing 55 Mo. 288; *Ward v. Maryland*, 13 Wall 418; *Georgia Packing Co. v. Mayor, etc. of Macon*, 60 Fed. Rep. 774; *Weil v. Calhoun*, 25 Fed. Rep. 865; *Bogan v. State*, 84 Ala. 449; *Powell v. State*, 69 Ala. 10; *State v. Deschamp*, 53 Ark. 490; *State v. Marsh*, 87 Ark. 356; *Ex parte Thomas*, 71 Cal. 204; *Town of Pacific Junction v. Dyer*, 64 Iowa, 88; *Fecheimer Bros. & Co. v. City of*

Louisville, 84 Ky. 306; *Daniel v. Trustees*, 78 Ky. 542; *State v. North & Scott*, 27 Mo. 464; *Albertson v. Wallace*, 81 N. C. 479; *State v. Nash*, 97 N. C. 514; *Sinclair v. State*, 69 N. C. 47; *Missouri v. Browning*, 62 Mo. 591; *Borough of Danville v. Leiberman*, 16 Pa. C. C. 394; *Ex parte Rollins*, 80 Va. 314. See *Graffy v. City of Rushville*, 107 Ind. 502.

³ *In re Hennick*, 1 Int. Com. Rep. 66.

⁴ *Albertson v. Wallace*, 81 N. C. 479.

⁵ *Ward v. Maryland*, 13 Wall 418.

⁶ *Fecheimer v. Louisville*, 84 Ky. 306.

⁷ *Daniel v. Trustees of Richmond*, 78 Ky. 542.

⁸ *Cook v. Pennsylvania*, 97 U. S. 566.

dealers;¹ or where any exception is made in favor of domestic products;² or where the amount of the tax is determined by reference to stock held in another State.³

License Tax Upon Drummers.—Taxation of commercial travelers is in many respects similar to taxation of the occupation of merchants, the most obvious difference between the two being that in the one case the licensee has a fixed place of business, while in the other he travels from place to place. The business of the merchant, like that of the traveling salesman, is the negotiation of contracts for the sale of goods.

The difference in the method of doing business necessarily affects the character of the tax by which the business can be reached. In the case of the merchant with the fixed place of business, it is possible to impose a tax which shall have reference to the whole of the business done throughout the year, and in effect amount to taxation of his stock in trade; while in the case of a traveling salesman, the only tax which can be collected is upon the occupation of selling. Under earlier cases this distinction was not important. Both occupations were within the doctrine of *Osborne v. Mobile*, which supported license taxes in one case as in the other.⁴

Under this rule the license tax was supported although the goods were not in the State at the time of the sale;⁵ and in some cases this tax was imposed only upon drummers

¹ *Singer Mfg. Co. v. Wright*, 38 Fed. Rep. 121; *Bogan v. State*, 84 Ala. 449; *McCreary v. State*, 73 Ala. 480; *Powell v. State*, 69 Ala. 10; *State v. Deeschamp*, 58 Ark. 490; *Pacific Junction v. Dyer*, 64 Iowa, 38; *Danville v. Leiberman*, 16 Pa. Co. Ct. Rep. 894. Conf. Ex parte Kinnebrew, 35 Fed. Rep. 52.

² *Webber v. Virginia*, 103 U.S. 344; *Graffy v. Rushville*, 107 Ind. 502; *State v. North*, 27 Mo. 464; *Crow v. State*, 14 Mo. 287.

³ *Corson v. Maryland*, 120 U. S. 502.

⁴ Ex parte Hanson, 28 Fed. Rep. 127; In re Rudolph, 6 Sawy. 205; *Commonwealth v. Fugate*, 6 Gratt. 698; *Corson v. Maryland*, 57 Md. 251; *Territory v. Farnsworth*, 5 Mont. 803, 824; *City of Titusville v. Brennan*, 143 Pa. St. 642.

⁵ Ex parte Hanson, 28 Fed. Rep. 127; In re Rudolph, 6 Sawy. 205; *Commonwealth v. Smith*, 6 Bush (Ky.), 308; *Mork v. Commonwealth*,

who had no regular place of business or residence in the locality where they were engaged.¹ This doctrine is now abandoned, and it is settled a State or Territory cannot tax the occupation of drummers selling goods which are kept without the limits of the State and shipped upon orders which are procured by the drummers.²

Where goods have been shipped into the taxing State there has been some diversity of opinion as to the validity of license taxes upon the occupation of negotiating their sale. Such taxes have been sustained in a number of cases even when the sales were made by the importer in original packages.³

6 Bush, 397; *Speer v. Commonwealth*, 23 Gratt. (Va.) 935; *Ex parte Thornton*, 4 Hughes, 220; *District of Columbia v. Humason*, 2 MacArthur, 158; *State v. Long*, 95 N. C. 582; *Ex parte Robinson*, 12 Nev. 263; *Ex parte Asher*, 23 Tex. Ct. App. 662, reversed in 128 U. S. 129.

¹*Robbins v. Taxing District of Shelby Co.*, 13 Lea, 303; *Speer v. Commonwealth*, 23 Gratt. (Va.) 935; *Ward v. State of Maryland*, 31 Md. 279; *State v. Richards*, 32 W. Va. 348; *Territory v. Farnsworth*, 5 Mont. 303.

²*Brennan v. Titusville*, 153 U. S. 289, reversing 143 Pa. St. 642; *Asher v. Texas*, 128 U. S. 129; *Corson v. Maryland*, 120 U. S. 502; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Welton v. Missouri*, 91 U. S. 275; *Ward v. Maryland*, 12 Wall. 418; *Ex parte Hough*, 69 Fed. Rep. 330; *In re Mitchell*, 62 Fed. Rep. 576; *In re Flinn*, 57 Fed. Rep. 496; *In re Rozelle*, 57 Fed. Rep. 155; *In re Houston*, 47 Fed. Rep. 539; *In re Spain*, 47 Fed. Rep. 208; *In re White*, 43 Fed. Rep. 913; *In re Kimmel*, 41 Fed. Rep. 775; *Stratford v. City Council of Montgomery*, 110

Ala. 619; *Ex parte Murray*, 93 Ala. 78; *State v. Agee*, 88 Ala. 110; *McClelland v. Mayor of Marietta*, 96 Ga. 749; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754; *City of Huntington v. Mahan*, 143 Ind. 695; *Martin v. Town of Rosedale*, 130 Ind. 79; *McLaughlin v. City of South Bend*, 126 Ind. 471; *City of Ft. Scott v. Pelton*, 39 Kan. 764; *McClelland, Tax Collector, v. Pettigrew*, 44 La. Ann. 326; *Coit v. Sutton*, 102 Mich. 324; *Wilcox, etc. Co. v. Mosher (Mich.)*, 72 N. W. Rep. 117; *Overton v. City of Vicksburg*, 70 Miss. 558; *Richardson v. State (Miss.)*, 11 So. Rep. 934; *Ex parte Rosenblatt*, 19 Nev. 439; *Ex parte Holman*, 36 Tex. Crim. App. 255; *Hurford v. State*, 91 Tenn. 669; *Talbutt v. State (Tex. Civ. App.)*, 44 S. W. Rep. 1091; *Clements v. Town of Casper*, 4 Wyom. 494; *State ex rel. Selliger v. O'Connor*, 5 N. D. 629; *City of Bloomington v. Bourland*, 137 Ill. 534; *State v. Brocco*, 103 N. C. 349; *In re Hennick*, 5 Mackey, 489; *Baxter v. Thomas*, 4 Okl. 605.

³*American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750; *In re Nichols*, 48 Fed. Rep. 164; *Hynes v. Briggs*, 41

The weight of authority, however, supports the rule that no tax can be laid upon the occupation of selling goods which have been introduced within the limits of the taxing State, so long as the goods remain in the original unbroken packages.¹

License Tax Upon Peddlers.—In some cases it has been held that no tax could be laid upon the occupation of peddling goods brought from other States.² The courts have recognized a difference, however, between a peddler and an ordinary salesman.

From early times in England and America there have been statutes regulating the occupation of itinerant peddlers and requiring them to obtain licenses. It has long been considered that the business of a peddler traveling from place to place among strangers, might easily be made a pretense or a convenience to those whose real purpose is theft or fraud, and that for this reason the occupation came particularly within the police jurisdiction of the State.

It has been held, therefore, that where there is no discrimination the State may require a license fee of peddlers, and that such regulation is valid even as applied to those who are engaged solely in peddling imported articles. Such a regulation as this is not a prohibition of, or burden on, their sale, but imposes what may be a necessary regulation upon a particular method of sale.³

Fed. Rep. 468; *Singer Mfg. Co. v. Wright*, 88 Fed. Rep. 121; *Weaver v. State*, 89 Ga. 689; *Metz v. Hagerty*, 51 Ohio St. 521; *State v. Pinckney*, 10 Rich. (S. C. L. R.) 474; *Biddle v. Commonwealth*, 18 Serg. & R. 405.

¹ *In re Tyerman*, 48 Fed. Rep. 167; *State v. Shapleigh*, 27 Mo. 344. See *Commonwealth v. Harmel*, 166 Pa. St. 89.

² *Commonwealth v. Walter*, 3 Pa. Dist. Rep. 534; *Port Clinton v. Shafer*, 5 Pa. Dist. Rep. 583.

³ *Emert v. Missouri*, 156 U. S. 206, affirming s. c., 103 Mo. 241; *Howe Machine Co. v. Gage*, 100 U. S. 676; *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750; *Hall v. State*, 89 Fla. 687; *City of South Bend v. Martin*, 142 Ind. 81; *Sears v. Board of Commissioners*, 86 Ind. 267; *Cole v. Randolph*, 31 La. Ann. 535; *State v. Snoddy*, 128 Mo. 523; *State v. Parsons*, 124 Mo. 436; *State v. Wessell*, 109 N. C. 735; *Wrought Iron Range Co. v. Carver*, 118 N. C. 328;

A State can require that peddlers give proof of good moral character in order to obtain a license,¹ and may lay a license tax on peddlers selling imported goods; and this is true though the peddling be from a boat,² and, of course, where the goods sold are not in the original packages.³

A State may regulate sales of medicines.⁴ But no license tax on peddlers can discriminate against interstate or foreign commerce.⁵

Tax Upon Auctioneers.—The same rule is applied to sales by auctioneers, and license fees upon this occupation have been sustained, when imposed alike upon all sales made within the taxing jurisdiction, whether the goods are the produce of the taxing State or not.⁶

Commonwealth v. Gardner, 133 Pa. St. 284; *Commonwealth v. Myer*, 92 Va. 809; *State v. Richards*, 32 W. Va. 348; *Rash v. Farley*, 91 Ky. 344; *Howe Machine Co. v. Gage*, 9 Baxter (Tenn.), 518; *Ex parte Butin*, 28 Tex. App. 804; *In re Wilson*, 19 D. C. 341; *Ex parte Mosler*, 1 Toledo Leg. N. 286; *Morrill v. State*, 38 Wis. 428; *Wynne v. Wright*, 1 Dev. & Bat. 19; *Cowles v. Brittain*, 2 Hawks, 204. *Conf. City of Carrollton v. Bazette*, 159 Ill. 284.

¹ *Commonwealth v. Harmel*, 166 Pa. St. 89.

² *Cole v. Randolph*, 81 La. Ann. 585.

³ *Wynne v. Wright*, 1 Dev. & B. (N. C.) 19; *In re Wilson*, 19 D. C. 341; *Hall v. State*, 89 Fla. 687; *People v. Sawyer*, 106 Mich. 428; *State v. Parsons*, 124 Mo. 436; *State v. Smithson*, 106 Mo. 149.

⁴ *State v. Wheelock*, 95 Iowa, 577; *State v. Parsons*, 124 Mo. 436; *Com-*

monwealth v. Newhall, 164 Mass. 338; *State v. Smithson*, 106 Mo. 149.

⁵ *Welton v. State of Missouri*, 91 U. S. 275, reversing 55 Mo. 288; *In re Watson*, 15 Fed. Rep. 511; *Vines v. State*, 67 Ala. 73; *State v. McGinnis*, 37 Ark. 362; *Ex parte Thomas*, 71 Cal. 204; *Rogers v. McCoy*, 6 Dak. 238; *City of Marshalltown v. Blum*, 53 Iowa, 184; *Rash v. Halloway*, 82 Ky. 674; *State v. Furbush*, 73 Ma. 493; *State v. Browning*, 62 Mo. 591; *State v. Adsit* (Mich.), 73 N. W. Rep. 381; *Commonwealth v. Simons*, 3 Pa. Dist. Rep. 792; *Rothermel v. Zeigler*, 7 Pa. Co. Ct. Rep. 505; *Commonwealth v. Myer*, 92 Va. 809; *State v. Pratt*, 59 Vt. 590; *Van Buren v. Downing*, 41 Wis. 122. *Conf. South Bethlehem v. Hackett*, 7 Int. Com. Rep. XXXI.

⁶ *Woodruff v. Parham*, 8 Wall. 123, cited with approval in *Emert v. Missouri*, 156 U. S. 296-314.

TAXATION OF PURCHASES AND SALES.

Taxation of occupations by reference to the amount of business done, when applied to merchants buying and selling goods brought from other States, presents in somewhat different form the questions presented by State taxation of receipts from interstate transportation.

That such a tax rests usually upon the act of sale appears from the fact that payment does not exempt the property of the taxpayer from its regular taxation borne in common with other property in the State, and also from the fact that a tax upon receipts is not measured by the capital which a merchant employs in his business, but by the number of times his capital may be turned. An active merchant turning his stock four or five times a year will pay four or five times the tax paid by a merchant having an equal capital, but who sells his stock once. A tax upon the amount of purchases and sales is therefore a tax upon activity, and is for this reason invalid when applied to goods brought from or sent to other States¹ or foreign countries.²

In some cases such taxation has been sustained,³ apparently on the ground that the burden fell upon the goods which are the subject of sale;⁴ and where this is the fact, and the goods are taxed like all other property in the State, the circumstance that the tax is laid in the form of a license is not alone sufficient to make it invalid.⁵

In most cases in which taxation of purchases and sales has been sustained, the reasons for the decision given in the opinion of the court are clearly against current authority. Thus, in *State v. Pinckney*⁶ it was considered that taxation

¹ *Ficklin v. Shelby County Taxing District*, 145 U. S. 1. As to effect of decision in the *Ficklin* case, see *Brennan v. Titusville*, 158 U. S. 289; *Stratford v. City Council of Montgomery*, 110 Ala. 619; *Louisiana v. Kennedy*, 19 La. Ann. 397.

² *Cook v. Pennsylvania*, 97 U. S.

566; *Gelpi v. Schenck*, 48 La. Ann. 585.

³ *Harrison v. Mayor of Vicksburg*, 3 Sm. & M. (Miss.) 581.

⁴ *Ex parte Brown*, 48 Fed. Rep. 435.

⁵ *Postal Tel. Co. v. Adams*, 155 U. S. 688.

⁶ 37 S. C. L. 474.

upon the subjects of interstate commerce was valid until superseded by Federal legislation. In *State v. French*¹ the court sustained the tax both upon the ground that it did not rest upon interstate commerce, and also upon the authority of the *Maine Gross Receipts Case*.² Neither of these reasons is in accord with the weight of authority. The Maine case, which sustained a tax upon receipts of a foreign corporation for the privilege of exercising its franchises within the State, is no authority for taxation of the income of a natural individual.

In *Ex parte Brown*³ the State law imposed, in addition to an *ad valorem* tax upon stock, a further license tax of one-tenth of one per cent. on the total amount of purchases in or out of the State. Under the Constitution of North Carolina the tax could not be supported as upon property, and could only be sustained as a license tax upon the occupation of buying or selling goods. In this aspect, as applied to the occupation of selling goods brought from other States, it appears to be clearly within the prohibition of the Federal Constitution.

In *Davis v. Dashiell*⁴ a tax of this nature, which discriminated against the products of other States, was apparently sustained on the ground that the act of offering the goods for sale at retail brought them within the State jurisdiction, a doctrine which the same court subsequently disapproved. Whether the tax be valid or not when equally laid, a discriminating tax is always void.⁵

¹ 109 N. C. 722; followed in *State v. Stevenson*, 109 N. C. 730.

² *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.

³ 48 Fed. Rep. 495.

⁴ 61 N. C. 114; *Tracey v. State*, 3 Mo. 3; *Seymour v. State*, 51 Ala. 52. *Conf. People v. Coleman*, 4 Cal.

45; *Sears v. Board of Commissioners of Warren County*, 36 Md. 267; *Biddle v. State*, 18 Serg. & R. 405.

⁵ *Albertson v. Wallace*, 81 N. C. 479; *Daniel v. Trustees of Richmond*, 78 Ky. 542; *State v. North*, 27 Mo. 464.

CHAPTER IX.

REGULATION OF FREIGHTS AND FARES.

It has been said that the power of the States to tax interstate rates, and their power to regulate these rates, are both determined by the same considerations, and that either taxation or regulation of receipts from transportation produce the same result. "It is impossible," said Mr. Justice Miller, "to see any distinction in its effect upon commerce,—between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation."¹ The conclusion has therefore been drawn that, when taxation of this character can be sustained, regulation may also be sustained.

There are, however, practical distinctions between taxation and regulation which have important bearing upon the question. Taxation is measured by the needs and the policy of the State. Its amount is fixed by local conditions. Interstate rates may therefore be taxed without regard to that portion of the transportation which is beyond State limits and jurisdiction. Regulation of rates, on the other hand, necessarily involves consideration of the rate as a whole, with reference to the complete act of transportation. In the case of interstate rates this must always be beyond the power of any single State. "How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio or Pennsylvania? The reasonableness of such a rate depends, among other things, upon the cost of construction and wages paid beyond her jurisdiction, the amount of capitalization allowed, and taxes and assessments exacted by other jurisdictions; the terms of contracts for the interchange

¹ *Wabash R. R. Co. v. Illinois*, 118 *Bridge Co. v. Kentucky*, 154 U. S. 557, 570; *Covington*, etc. 204, 222.

of freight between carriers made and allowed under the laws of other States; and the amount of traffic carried, which may, in turn, be affected by laws of the other States governing the acquisition of, or consolidation with other lines. These, and many others, are the elements of the cost of carriage, and before the reasonableness of a rate can be determined, the cost must be ascertained."¹

If one State might regulate with reference to mileage the charges to be made by interstate carriers for transportation within its limits, another State might regulate the charge with reference to expense, and the result might be that the carrier would be so limited in the several States through which he operated that he could not collect for the whole service a total charge which would be reasonable under the laws of all States. It is therefore well settled that a State may not regulate interstate rates,² though it may tax them under certain conditions.³

State Regulation of Domestic Rates.—Unless restrained by valid contract a State may, directly by the legislature, or indirectly by a commission, regulate freights and fares for

¹Swift v. Philadelphia, etc. R. R. Co., 58 Fed. Rep. 858, 860; Smyth v. Ames, 169 U. S. 466, 171 U. S. 361; Fitzgerald v. Construction Co., 41 Neb. 374.

²Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204; Wabash R. R. Co. v. Illinois, 118 U. S. 557, reversing s. c., 105 Ill. 286; Mobile, etc. Ry. Co. v. Sessions, 28 Fed. Rep. 592; Farmers' Loan & Trust Co. v. Stone, 20 Fed. Rep. 270; Illinois Central R. Co. v. Stone, 20 Fed. Rep. 468; Louisville, etc. R. Co. v. Railroad Commission of Tennessee, 19 Fed. Rep. 679, 718; Pacific Coast Steamship Co. v. Railroad Commissioner, 18 Fed. Rep. 10; Kaiser v. Illinois, etc. R. Co., 18 Fed. Rep. 151; Mobile, etc. Ry. Co. v. Dis-

mukes, 94 Ala. 181; State v. Chicago, etc. R. Co., 70 Iowa, 163; Carton v. Illinois Central R. Co., 59 Iowa, 148; Commonwealth v. Housatonic, etc. R. Co., 143 Mass. 264; Southern Pacific R. Co. v. Haas (Tex.), 17 S. W. Rep. 600; Texas, etc. R. Co. v. Clark, 4 Tex. Civ. App. 611; Railroad Commissioners v. Railroad Co., 23 S. C. 220; Gulf, etc. R. R. Co. v. Miami S. S. Co., 86 Fed. Rep. 407. Conf. Chicago, B. & O. R. R. Co. v. Iowa, 94 U. S. 154; Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164; Stone v. Yazoo, etc. R. Co., 62 Miss. 607; Hall v. South Carolina R. Co., 25 S. C. 564; *ante*, p. 183.

³Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

transportation wholly within its limits; provided, however, that carriage is not required upon terms that amount to the depriving of liberty or property without due process of law or a denial of the equal protection of the law;¹ and that what is done does not amount to a regulation of foreign or interstate commerce.²

In its regulation of rates for transportation beginning and ending within the State, the reasonableness of the charge must be determined with reference solely to the business done by the carrier within the State, and without regard to its interstate business or profits. "The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. . . . It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."³

It has been argued that an exception to the rule should be made in favor of corporations which derive their franchises from the Federal government and whose authority to charge

¹ Fourteenth Amendment, U. S. Co., 116 U. S. 807; *Ruggles v. Illinois*, 108 U. S. 581; *Granger Cases*, 94 U. S. 155, 164, 180; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 861; *Baltimore & Ohio R. R. Co. v. Maryland*, 21 Wall. 456; *Chicago & N. W. R. Co. v. Dey*, 85 Fed. Rep. 866; *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165; *Central Union Telephone Co. v. State*, 118 Ind. 194.

² *Smyth v. Ames*, 169 U. S. 466; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 863; *Brass v. North Dakota*, 153 U. S. 391; *Budd v. New York*, 148 U. S. 517; *Railway Co. v. Minnesota*, 184 U. S. 418; *Dow v. Beidelman*, 125 U. S. 680; *Georgia Railroad and Banking Co. v. Smith*, 128 U. S. 174; *Wabash R. R. Co. v. Illinois*, 118 U. S. 557; *Stone v. Trust*

³ *Smyth v. Ames*, 169 U. S. 466, 541.

and collect tolls is not derived from the State. It is well established, however, that while Congress might remove such a corporation in all its operations from State control, nevertheless, in the absence of an express provision, the fact alone that the corporation affected derives its charter powers from the Federal government does not deprive the States of the right to regulate freights and fares for domestic transportation.¹

In *Shipper v. Pennsylvania Ry. Co.*² an instance may be found of regulation of domestic rates which would probably under present decisions be considered unconstitutional. In this case the question concerned the rate to be charged by the railway company for transportation of flour from Pittsburg to Philadelphia. It was shown that the flour was manufactured in Virginia and sent by the owner to Pittsburg, where it was delivered to the carrier. The railway, in accordance with a State law which required it to make a reduction of charges for the transportation of local freight equal to a tonnage duty imposed thereon by the State, charged the shippers a greater rate for carriage from Pittsburg to Philadelphia than was required for the transportation of flour manufactured in the State. This discrimination was upheld. The result of such a statute is the imposition of a burden upon goods imported from foreign States by reason of their foreign origin; and this, whether under the guise of a regulation of domestic transportation or not, is, according to the modern rule, beyond the power of any State.

Federal Regulation of Interstate Rates.—It has been argued that the commerce clause of the Constitution does not confer upon Congress the power to fix rates for interstate transportation. Commerce, it is said, includes the sale and exchange of commodities as well as their transportation, and if a power to fix prices is derivable from the word “reg-

¹ *Smyth v. Ames*, 169 U. S. 466; U. S. 413; *Ames v. Union Pac. R. R. Co.*, 64 Fed. Rep. 165.

² 47 Pa. St. 333.

ulate," it would include as much the prices for which subjects of commerce should be sold as the rates for which they should be carried.

In any event the relation of Congress to interstate commerce is different from that of the States to domestic commerce. Railroad franchises, with few exceptions, are granted by the States, not by the Federal government.

It is necessarily admitted, however, that Congress has the power to prevent unjust discrimination in interstate transportation, and to provide for actions at law to recover for unreasonable charges. If Congress may prohibit unreasonable charges, it must have power to establish what charges shall be reasonable. When the framers of the Constitution granted to Congress power to regulate commerce, they conferred upon the Federal government the power of commercial regulation as it was then known, varying in extent with the subject to which it was applied. That regulation of charges of common carriers was a commercial regulation was well understood; but it was equally well understood that there were many private transactions over which governmental power was more limited. It was recognized that the States could regulate charges of common carriers for domestic carriage. If they were deprived of this power over interstate transportation, it must have been lodged somewhere, and it is now settled is found in the clause which gives to Congress plenary powers of regulation of rates for interstate¹ and foreign² commerce, subject to the constitutional limitations; for instance, such as are contained in the Fifth Amendment, that no person shall be deprived of liberty or property without due process of law, and that private prop-

¹Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204; Atlantic & Pacific Ry. Co. v. United States, 76 Fed. Rep. 186; Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. Rep. 190; Bullard v. Northern Pacific R. Co., 10 Mont. 168; Kauffman Milling Co. v. Missouri Pacific Ry. Co., 8 Int. Com. Rep. 400.

²New York Board of Trade v. Pennsylvania R. Co., 8 Int. Com. Rep. 417; In re Grand Trunk Ry. Co., 2 Int. Com. Rep. 496.

erty shall not be taken for public use without just compensation.

The Interstate Commerce Act.—This authority Congress has exercised by the passage of the act to regulate commerce.¹ The first section of this act requires all charges by railway carriers, engaged in interstate transportation, to be reasonable, and prohibits every unjust and unreasonable charge for such service. The second section defines unjust discrimination. The third section prohibits undue or unreasonable preferences to persons or localities, and requires that carriers, subject to the provisions of the act, afford equal facilities for the interchange of traffic with other lines, and prohibits discrimination by carriers between connecting lines. The fourth section, known as the long and short haul clause, prohibits a greater charge for a shorter than for a longer distance over the same line, in the same direction, under substantially similar circumstances and conditions. Upon application to the Commission, however, the carrier may, in special cases, after investigation by that body, be authorized to charge less for longer than for shorter distances.² In the fifth section it is made unlawful for any carrier, subject to the provisions of the act, to enter into any pooling contract with other carriers. The sixth section requires publication of rates, forbids change of rates except upon public notice, requires carriers to file with the Commission copies of traffic contracts with other carriers and of schedules of joint tariffs of rates, and prohibits collection of other charges than those specified in such schedules.

The eleventh section establishes a Commission known as the Interstate Commerce Commission, which by the twelfth section is charged with the duty of inquiring into the management of the business of common carriers and of executing

¹ Act of Feb. 4, 1887, 24 Stat. L. 443; Interstate Commerce Commission v. B. & O. R. Co., 145 U. S. 379, Supp. Rev. Stat. 529, amended by acts of March 2, 1889, 25 Stat. L. 263.

855, Supp. Rev. Stat. 684; Feb. 10, 1891, 26 Stat. L. 743, ch. 128, 1 Supp. Rev. Stat. 891; Feb. 11, 1893, 27 Stat. ² As to validity of this clause, see *post*, pp. 312, 313.

the provisions of the act. The Commission is authorized to issue subpoenas requiring attendance of witnesses and production of books and papers, and, in case of refusal of any witness to attend and testify, the order of the Commission is to be enforced by the United States Circuit Court upon application of the Commission.

In effect, "subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."¹ The railroads are limited, however, to the rates which they have fixed and published, and a contract to transport goods at a different rate cannot be enforced.²

The provisions which have been referred to, and which adopt certain of the common-law duties of carriers as part of the Federal law, have been substantially unquestioned, but the portions of the statute which relate to the powers of the Interstate Commerce Commission have been the subject of considerable litigation.

The Commission is undoubtedly an executive body. It cannot be judicial, for its members are not appointed to hold office during good behavior;³ and it is equally clear that it

¹ Interstate Commerce Commission v. Railway Co., 167 U. S. 479, 498; Interstate Commerce Commission v. B. & O. Ry. Co., 43 Fed. Rep. 87.

² Chicago, etc. R. Co. v. Hubbell, 54 Kan. 232; Savannah, etc. R. Co. v. Bundick, 94 Ga. 775; Houston, etc. R. Co. v. Dumas (Tex. Civ. App.), 43

S. W. Rep. 609; Gerber v. Wabash R. Co., 68 Mo. App. 145; Raleigh, etc. R. Co. v. Swanson (Ga.), 28 S. E. Rep. 601. *Contra*, Mobile, etc. R. Co. v. Dismukes, 94 Ala. 182.

³ Kentucky Bridge Co. v. Louisville & N. R. R. Co., 37 Fed. Rep. 567, 612.

is not a legislative body.¹ The duties with which it is charged — to enforce the provisions of the act — require that it shall investigate the management of railway companies; determine in specific cases whether the rates charged are reasonable or not, and whether the carriers have been guilty of unjust discrimination. It has no authority to prescribe maximum or minimum or absolute rates, and this result cannot be secured indirectly by determining what rates were reasonable in the past, and then procuring from the courts an order that, in the future, carriers adopt these rates. To prescribe future rates is a legislative act which the Commission is not authorized to perform.²

It is well established that the inquiry as to the past — whether rates which have been charged and collected were reasonable — is judicial,³ and it has been urged that this investigation is as much beyond the power of an executive body as would be the exercise of legislative functions.

The Brimson Case.— This difficulty appears even more strongly in cases where the Commission has attempted to compel attendance and testimony of witnesses to determine whether the law had been violated. Investigation to determine whether or not parties were guilty of past violations of law, it has been argued, is essentially of a judicial nature, and in conducting such an investigation the Commission, in effect, duplicates the functions of the grand jury.

¹ *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479 501.

² *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, affirming 74 Fed. Rep. 715; *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Cincinnati, N. O. & T. Pac. Ry. Co.*, 162 U. S. 184; *Farmers' Loan & Trust Co. v. Northern Pacific Ry. Co.*, 83 Fed. Rep. 249; *Interstate Commerce Commission v. Northeastern R. Co.*, 83

Fed. Rep. 611; *Thatcher v. Fitchburg R. Co.*, 1 Int. Com. Rep. 356; *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 74 Fed. Rep. 784; *Interstate Commerce Commission v. Northeastern R. Co.*, 74 Fed. Rep. 70; *Interstate Commerce Commission v. L. & N. R. Co.*, 73 Fed. Rep. 409; *Cary v. Eureka Springs R. R. Co.*, 7 Int. Com. Rep. 286.

³ *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. R. Co.*, 167 U. S. 479, 499.

If Congress may authorize such inquiry by a commission of distinguished citizens, it may confer like power on a single individual for the entire country, or on a different individual for each State or county, or may attach it as a duty to an existing office, such as that of postmaster or United States marshal. It may thus constitute an indefinite number of citizens into examiners, armed with inquisitorial authority and a roving commission. Such investigations have no bearing on legislation; for, even if it were discovered that existing laws have been violated, the remedy is not to pass more laws, but to punish the violators.

It has been also argued that the Interstate Commerce Act imposes no duty upon witnesses to answer the questions of the Commission.

"It is true that authority is conferred upon the commission to obtain information, but the act does not impose the duty to furnish it upon all persons interested in interstate commerce; and Congress cannot invest the commission with discretionary powers to create or not create a duty. . . . Suppose a law was enacted making criminal the refusal to answer questions put by a commission, (and a statute would be necessary before such refusal could be adjudged criminal, for there are no common-law offenses against the United States — *United States v. Eaton*, 144 U. S. 677) would it not be necessary that the statute define the questions, or at least the scope of the questions to be asked? Would not an act be void for indefiniteness, and lack of certainty, which simply made criminal the refusal to answer relevant questions in any proper investigation carried on before a commission."¹

Furthermore, it was said that, whether a duty were created or not, there was no case or controversy of which a Federal court could take jurisdiction.

An application to compel a witness to answer a question, it has been said, is not a case. The statute itself appears to recognize that the investigation is elsewhere than in court,

¹ Dissenting opinion of Mr. Justice Brewer, 155 U. S. 8.

for the terms of the law are that the Commission "may invoke the aid of any court of the United States, in requiring the attendance and testimony of witnesses," etc. If every time the Commission claimed the right to an answer to a question, and the witness denied the right, a case or controversy had arisen under the Constitution, the witness could make every separate question the subject of a separate application to the court, with the consequent right of appeal. This would present the extraordinary spectacle of the Supreme Court or Circuit Court of Appeals deciding in succession a series of objections to evidence arising in a controversy carried on before an executive body.

As concerned the powers of the Commission the alternative appeared to be, therefore, that if the subject-matter of the investigation committed to the Commission were judicial, that body was incompetent, under the Constitution, to carry them out; while, on the other hand, if the subject-matter were such as could be committed to an executive body, it must be non-judicial in character and beyond the "aid" of the Federal courts. These objections were considered in the case of *Interstate Commerce Commission v. Brimson*.¹ The majority of the court in that case held that the act of Congress authorizing the Commission to summon witnesses and requiring the production of books and papers is a valid provision, imposing an obligation upon every one within Federal jurisdiction. As each citizen is bound to obey the law and yield obedience to constituted authorities acting within the law, this power conferred upon the Commission imposed upon any one summoned by that body the duty to appear and testify. The question whether the Commission is, under the law, entitled to the evidence it seeks, and whether the refusal of the witness to testify is, or is not, in violation of his duty or in derogation of his rights, when it arises and is presented in the form prescribed by the act of Congress, is a judicial question, and constitutes a case. It is

¹154 U. S. 447. For opinion of In re Interstate Commerce Commission dissenting justices, see 155 U. S. 3; mission, 53 Fed. Rep. 476.

substantially the question which would arise if the witness were proceeded against by an indictment.

Congress has plenary power, subject to the limitations imposed by the Constitution, to prescribe the rule by which commerce among the several States is to be governed. It cannot be disputed that the prohibition of unjust charges, discriminations or preferences by carriers engaged in interstate commerce is a proper regulation. Such prohibition may be enforced by criminal proceedings. Refusal of witnesses to testify to facts within their knowledge, showing whether or not the law had been violated, might be punished by indictment and trial under the criminal law. If Congress has power to accomplish this result indirectly by particular forms of judicial procedure, it must have power to accomplish the same result directly and by a different proceeding, judicial in form. An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses and to compel the production of books and papers, would go far to defeat the object for which the people of the United States placed commerce among the States under national control.

Rule in the Absence of Federal Statute.—In some cases State regulations affecting interstate rates have been sustained upon the ground that a State has jurisdiction, not over the rates, but over the charter of the carrier. An unjust discrimination, whether for interstate or domestic transportation, it is said, is a misuse of the corporate franchise, and may be remedied by the State from which the franchise is derived.¹ This rule, if sustained, would indirectly bring within State control the whole field of interstate commerce, which, by the Constitution, is given to the Federal government, and the rule, which is supported by the weight of authority, is that a State cannot, by regulation of charter or

¹State v. Cincinnati, etc. R. R. Coal Co. v. Providence & Worcester Co., 47 Ohio St. 130; Providence ter R. R. Co., 15 R. I. 303.

otherwise, forbid discrimination by railroad companies in rates for interstate transportation.¹

Regulation of Warehouse Rates.—The business of assorting and handling grain in warehouses and elevators is affected with a public interest, and subject to the police power of the State in the regulation of its rates² and obligations.³

In *Budd v. New York*⁴ the court called attention to the fact that a large proportion of the surplus cereals of the country passes through the elevators on the lakes, by the Erie canal and Hudson river, to the seaboard of New York, where it is distributed to the markets of the world; that the business of elevating grain is incident to transportation, and that elevators are indispensable instrumentalities in the business of the common carrier, in a broad sense themselves performing the work of carriers; that by their means transportation of grain from the upper lakes to the seaboard is rendered possible, and that the business of elevating grain has thus a vital relation to commerce in one of its most important aspects, so that every excessive charge made in the course of the transportation of grain is itself a tax upon commerce.

It would seem that the regulation of such a business might well have been considered as beyond the power of the State. The decision of the court is, however, that regulation of warehouse rates operating only within the limits of a single State is analogous to the regulation of wharfage and other similar charges.⁵

Local Regulations Affecting Rates.—Many regulations which incidentally affect freights and fares derived from in-

¹ *Gatton v. Chicago, etc. R. R. Co.*, 95 Iowa, 112; *Wigton v. Penn. R. R. Co.*, 8 Pa. C. C. Rep. 191; *Louisville, etc. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679, 711. *Contra*, *Gulf, etc. R. R. Co. v. Barry*, — Tex. Civ. App. —, 45 S. W. Rep. 814.

² *Munn v. Illinois*, 94 U. S. 112, 69 Ill. 80; *In re Pinto*, 59 Hun, 413.

³ *Brass v. Dakota*, 153 U. S. 391, 2 N. Dak. 482.

⁴ 143 U. S. 517.

⁵ *Id.*; *Brass v. Stoesser*, 153 U. S. 391, affirming the same case, 2 N. Dak. 482.

terstate commerce are regarded as police regulations within the power of a State. Of this class is the requirement that rates of interstate transportation should be made public and posted in a certain manner, which it has been held, in the absence of Federal legislation, is within the authority of the State.¹ This subject being now covered by Federal legislation is not open to State legislation. It is still held, however, that States may require railroad companies, before the arrival of passenger trains at stations where there is a telegraph office, to post information whether the train is on schedule time.² A statute providing that railroad companies should not increase rates after the tender of freight has also been sustained as applied to interstate shipments.³

¹ *Railroad Co. v. Fuller*, 17 Wall. 560; *Fuller v. Railroad Co.*, 81 Iowa, 187, 211; *Railroad Co. v. Hesley*, 158 U. S. 98, 103; *Stone v. Railroad Co.*, 116 U. S. 397, 334.

² *State v. Indiana, etc. R. R. Co.*, 133 Ind. 60; *State v. Pennsylvania R. R. Co.*, 133 Ind. 700.

³ *Chicago, etc. R. R. Co. v. Wolcott*, 141 Ind. 297.

CHAPTER X.

REGULATION OF CORPORATE FRANCHISES.

A franchise, as defined by Mr. Justice Bradley in *California v. Railroad Co.*,¹ "is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security."

For the purpose of this consideration, franchises may be divided into two classes: those of corporate existence and those of corporate powers; or, to use a common phrase, franchises to be and franchises to do. "When the legislature grants a charter of incorporation, it confers upon the grantees of the charter the right or privilege of forming a corporate association, and of acting within certain limits in a corporate capacity, and this right or privilege is called the corporate franchise. . . . Sometimes charters of incorporation confer additional rights which do not pertain to the formation of the association, as, for example, the right to take private property under the power of eminent domain, or the exclusive right of establishing a ferry and charging tolls. These rights are also called franchises."²

An examination of the cases shows that, as regards corporations engaged in interstate commerce, franchises of the first class may be taxed by the State by which they were granted. Franchises of the second class, so far as exercised in interstate commerce, cannot be taxed or directly regu-

¹ 127 U. S. 40.

tions, sec. 922, citing *Paul v. Vir-*

² Morawetz on Private Corpora- *ginia*, 8 Wall 168.

lated by the State;¹ for, if the corporation derives from the State the power to exercise these franchises within its limits, its further right to exercise them in commerce between States is an added grant conferred by the Federal Constitution. An illustration of the difference between the power of the States in the two classes referred to is found in *Wiggins Ferry Co. v. East St. Louis*.² In this case a license tax laid by the city of East St. Louis upon a corporation of Illinois for the privilege of maintaining a ferry across the Mississippi river was sustained.

The right to maintain a ferry, it was said, is, like a grant of incorporation, a sovereign grant. The power of the State to impose a license tax on trades or callings generally, especially those which are quasi-public, cannot be disputed. Draymen may be compelled to pay a license tax on every dray owned by them, and hackmen on every hack. The Constitution of the United States does not protect the keeper of a ferry from a similar tax upon the boats which he employs, for the tax is not upon interstate commerce, but upon the right derived from the State to maintain a ferry, and is the same whether the ferry-keeper is or is not engaged in interstate commerce. The fact that the ferry crosses a river which divides two States cannot of itself change the nature of the exaction.

A tax on the corporate franchise is a tax on the privilege of corporate existence with the possession of certain powers. Such existence has no relation to interstate commerce without the exercise of the powers conferred. To tax the creature, or the means whereby it is brought into being, is a tax on the corporate franchise, not a tax upon operations of the creature in interstate commerce. It would hardly be

¹ Case of State Freight Tax, 15 Wall. 282; State Tax on Gross Trunk Ry. Co., 142 U. S. 217; San Francisco v. Telegraph Co., 96 Cal. 140. ² 107 U. S. 365.
 Fargo v. Michigan, 121 U. S. 280; 140.
 Steamship Co. v. Pennsylvania, 123 U. S. 326; Railroad Co. v. Pennsyl-

doubted that, as far as interstate commerce is concerned, a tax on the corporate franchise of a railroad company would be valid, although activity had ceased with the completion of its organization, and it had made no attempt to exercise its other franchises. A tax on a corporation is not invalid merely because it has the power of engaging in interstate commerce. It must actually be so engaged to secure immunity.¹

On the other hand, the exercise of the franchise to engage in interstate commerce may not be burdened. If, in the *Wiggins* case, the tax had been laid upon the number of times the boats crossed the Mississippi river or landed on the Illinois side, it would have been a tax upon franchises of the second class enumerated above, and beyond the power of the State. This was the decision in *Gloucester Ferry Co. v. Pennsylvania*,² where the question concerned the validity of a law of Pennsylvania taxing a proportionate share of the capital stock of a ferry company created by Delaware. This tax rested partly upon its business in landing and receiving passengers at the wharf in Philadelphia, and was therefore unconstitutional. A tax or burden imposed upon the property of a domestic or foreign corporation because used to carry on interstate commerce, or upon the exercise of its powers in the transaction of interstate commerce, is invalid.

Stipulations in Charters.—A State may exact a bonus for the grant of a franchise, and this exaction may take any form which is agreed upon by the parties. The State may impose as a condition of the grant, as well as also of its continued exercise, the payment of a specific sum each year, or may require a portion of the receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be convenient and just. There is no constitutional inhibition against the adoption of any mode to

¹ *Honduras, etc. Association v. 162 U. S. 167; Central Pacific R. R. State Board, 54 N. J. L. 279; South- Co. v. California, 162 U. S. 91.*
² *114 U. S. 196, 211.*

arrive at the sum which the State will exact as a condition of the creation of the corporation or of its continued existence.¹

In *Railroad Co. v. Maryland*² the charter of the company contained a stipulation that at the end of every six months one-fifth of the whole amount received for the transportation of passengers should be paid to the State. This stipulation was sustained as a compensation for the grant of franchises which the State had the right to grant or to withhold, at its discretion.

In *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co.*,³ a charter requirement that a railroad company should pay the State ten cents for each passenger was considered a valid contract between the State and the carrier, even as applied to interstate commerce.⁴ The same conclusion was reached in the case of *Camden & Amboy Ry. Co.*,⁵ where a restriction in the charter upon the amount of transportation charges was held to apply to interstate transportation; and in Missouri it has been held that a State may, as a condition for the grant of a ferry license over a river between States, limit the charge to be made for the round trip.⁶

It has also been held that a stipulation in a charter by which the State gives to the grantee the exclusive right of transportation for a certain period is a valid contract. No State can be compelled to make a railroad, a canal, or any other highway, nor can it be compelled to keep in repair those highways which it may have constructed or authorized. If, then, it may exercise a discretion to build, or to refuse to build, a road, it follows that it may agree to abstain for a definite period from building a certain road.

¹ *Horn Silver Mining Co. v. New York*, 143 U. S. 805, 818; *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 210.

² 21 Wall. 456; s. c., 84 Md. 344; *Railroad Co. v. Maryland*, 45 Md. 596.

³ 18 N. J. Eq. 546.

⁴ See also *Pennsylvania R. Co. v. Commonwealth*, 8 Grant's Cas. 128.

⁵ 22 N. J. Law, 623.

⁶ *State v. Sickmann*, 65 Mo. App. 499.

Whether a given improvement is, or will be, required within a certain time is a question addressed to the discretion of the legislative department of the government.¹

The difference between an obligation which the company thus voluntarily assumes by contract in its charter or otherwise, and a tax laid upon its receipts, is in the purpose of the payment. A tax upon receipts is a tax because of transportation, and is therefore a tax upon transportation. The sum paid by the railroad company to the State as a condition of the grant of a franchise is a compensation paid for the franchise itself, and is one of the expenses of maintenance, its origin being found in a commercial contract voluntarily made, and not in a governmental regulation imposed. The same rule has been applied to foreign corporations seeking a grant of corporate power from another State. In *Ashley v. Ryan*² it was held that a State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions upon the grant of its franchises as it deems proper, and the acceptance of the franchises implies a submission to the condition without which they could not have been obtained. In this case the State required a payment by the corporation based upon its entire authorized capital stock. This requirement, if imposed as a tax, would have been invalid. It was, however, within the discretion of the State to withhold or to grant the privilege of corporate existence, and it followed that it might impose whatever con-

¹ *Raritan & Delaware Bay Ry. Co. v. Delaware & Raritan Canal Co.*, 18 N. J. Eq. 546; *Fanning v. Gregoire*, 16 How. 524; *Burlington & Henderson Ferry Co. v. Davis*, 48 Iowa, 133; *Phillips v. Town of Bloomington*, 1 Greene (Iowa), 493; *United States v. Fanning*, 1 Morris (Iowa), 343; *Conway v. Taylor's Executor*, 1 Black, 603; *Challiss v. Davis*, 56 Mo. 25; *Carroll v. Campbell*, 108 Mo. 550, 110 Mo. 557; *Mar-*

shall v. Grimes, 41 Miss. 27; *Mayor of New York v. Starin et al.*, 106 N. Y. 1; *Mayor of New York v. N. J. Steamboat Navigation Co.*, 106 N. Y. 28; *Nixon v. Reid*, 8 S. Dak. 507; *Mills v. County of St. Clair*, 2 Gil. 197; *Newport v. Taylor's Executors*, 16 B. Mon. 699. See Opinion of Mr. Justice Field in *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1.

² 153 U. S. 436.

ditions it deemed fit, as a prerequisite of corporate life. The exaction therefore constituted no tax upon interstate commerce or the instruments thereof, and its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits.¹

A State may not, however, even by charter stipulations or by contract with the carrier, acquire the right to regulate foreign or interstate commerce.² Reservations in the charter which give the State something more than compensation for its franchises are invalid. The State may not, for instance, acquire by contract authority to regulate rates, or the order in which goods shall be forwarded, or the accommodations of passengers.

It is probable, too, that here, as elsewhere, discrimination against other States would be within the constitutional prohibition. In *Consumers', etc. Gas Co. v. Harless*³ it was held that the State, while conferring the power of eminent domain upon corporations organized to transport natural gas and petroleum from point to point within the State, might deny that power to corporations organized to transport these products out of the State. It is doubtful whether this decision is in accord with present doctrine. The power of eminent domain is, it is true, within the right of a State to grant or withhold. It may be denied to all corporations, or may be given only to a favored few, and the exercise of the legislative discretion in this respect, if otherwise constitutional, is not open to review. When, however, a privilege is granted to domestic carriers which is denied to interstate carriers, a burden is imposed upon the exercise of a constitutional right. An analogous case may be found in those statutes by which States have sought to make it a condition of the right of

¹ *Ashley v. Ryan*, 153 U. S. 496; 128. *Conf. Moline Plow Co. v. Wilkinson*, 105 Mich. 57.

Maine v. Grand Trunk Ry. Co., 142 U. S. 217; *Home Insurance Co. v. New York*, 184 U. S. 594; *California v. Pacific Ry. Co.*, 127 U. S. 40; *Penn. R. R. Co. v. Comm.*, 3 Grant's Cas.

² *Louisville, etc. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679.

³ 181 Ind. 446.

foreign corporations to do business within their limits that they renounce the right of removal to the Federal courts of suits brought against them. As concerns corporations not engaged in interstate commerce, a State may, in its discretion, refuse the right of entrance, but it cannot make its decision depend upon the renunciation by the corporation of this constitutional right.¹

Regulations of Domestic Franchises.—Corporate franchises which have been granted by a State still remain subject to its regulation to a certain extent; but having been granted, no further compensation for the grant can be exacted of the companies which have received them. In the case of a corporate franchise to maintain a bridge across the Ohio river, it was held that although the charter was subject to amendment or repeal at the will of the legislature, nevertheless it was beyond the power of the State to regulate the charges made by the bridge company for interstate commerce.²

The franchise of corporate existence is by the law of most States personal property, subject to taxation by the State of its grant, and the extent of such a tax is beyond the jurisdiction of the Federal court.³

“Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways, Congress

¹ *Barron v. Burnside*, 121 U. S. 186; *Trunk Ry. Co. v. State*, 143 U. S. 217; *Delaware Ry. Tax Case*, 18 Wall 306;

² *Covington & Cincinnati Bridge Co. v. Commonwealth*, 154 U. S. 224; *Lumberville Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 529.

³ *Horn Silver Mining Co. v. New York*, 143 U. S. 305; *Maine v. Grand*

reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."¹

If it be assumed that the States may not forbid consolidation of competing lines, it would follow that Congress could authorize such consolidation in defiance of State legislation,—a proposition which only needs to be stated to demonstrate its unsoundness.²

It is generally held that the use to which corporate franchises may be put, and the circumstances under which they may be forfeited, are questions which belong peculiarly to the State by which the franchise was granted.

The power to purchase, or to combine or consolidate with, competing lines is one which the State may grant or withhold.³

Upon this principle it has been held in Texas that corporations created under the laws of that State which have entered into a combination to control both domestic and interstate rates may be restrained by a State court from carrying out the combination in violation of law.⁴

¹ Louisville, etc. R. Co. v. Kentucky, 161 U. S. 677, 702.

² Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 702. See Louisville & N. R. Co. v. Commonwealth, 97 Ky. 677.

³ Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 703, citing Montgomery's Appeal, 136 Pa. St. 96; Pennsylvania R. R. Co. v. Commonwealth (Pa. St.); 7 Atl. Rep. 368; Boardman v. Lake Shore, etc. Ry. Co., 84 N. Y. 157; Gulf, C. & S. F. Ry. Co. v. State, 72 Tex. 404; East Line, etc. Ry. Co. v. Rushing, 69

Tex. 306; State v. Atchison, etc. Ry. Co., 24 Neb. 143; Hafer v. Cincinnati, H. & D. R. Co., 29 Weekly L. B. 68; Currier v. Concord R. R. Co., 48 N. H. 321; Texas & P. R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970; Clark v. Central R. R. Co., 50 Fed. Rep. 333; Hamilton v. Savannah, etc. R. R. Co., 49 Fed. Rep. 412; Kimball v. Atchison, T. & S. F. R. Co., 46 Fed. Rep. 388; Langdon v. Branch, 37 Fed. Rep. 449.

⁴ Gulf, etc. Ry. Co. v. State, 72 Tex. 404.

CHAPTER XI.

THE FEDERAL LEGISLATIVE POWER.

Congress appears to recognize in its legislation a difference in the extent of its power to regulate the three branches of commerce mentioned in the clause.

Over foreign commerce its power has been used to raise national revenue, to influence foreign relations, and to protect American trade and manufacture. The first protective tariff was enacted by Congress on the 4th of July, 1789, and while question was later raised as to the constitutionality of such taxation, it seems to be settled, by long practice, that this is a legitimate application of the Federal power of taxation and commercial regulation.¹ Congress may levy a tax upon the admission of foreigners;² it may prohibit persons of certain classes³ and certain nationalities⁴ from entering the country, and may regulate proceedings for the deportation of such persons as enter the country in violation of these laws.⁵ Congress has even laid, by embargo, a total prohibition upon foreign commerce, and it is probable that this regulation is within the constitutional grant of power.⁶ It seems,

¹ As to constitutionality of bounties, see *United States v. Realty Co.*, 163 U. S. 427.

² *Head Money Cases*, 112 U. S. 580; *Edye v. Robertson*, 18 Fed. Rep. 185; Act of Aug. 3, 1882, 22 Stat. L. 214, Supp. R. S. 870; Act of Aug. 18, 1894, 28 Stat. L. 338.

³ *Post*, p. 387; *Lees v. United States*, 150 U. S. 476; *Church of Holy Trinity v. United States*, 148 U. S. 457; *Nishimura Ekiu v. United States*, 142 U. S. 651; *United States v. Craig*, 28 Fed. Rep. 795.

⁴ *Chinese Exclusion Case*, 130 U. S. 581; *Fong Yue Ting v. United States*, 149 U. S. 698.

⁵ *Fong Yue Ting v. United States*, 149 U. S. 698; *United States v. Williams*, 88 Fed. Rep. 997; *Chan Gun v. United States*, 9 App. Cas. (D. C.) 290.

⁶ *Elliott's Debates*, vol. 5, p. 455; *Life and Letters of Justice Story*, pp. 185, 186; *Hamilton's Works*, edited by Lodge, vol. 3, pp. 179, 203; *Story on Constitution*, sec. 1289; *Von Holst, Const. Hist. of U. S.*,

too, that without the consent of Congress no one may establish a physical connection by telegraph cable between the shores of this country and of any foreign country.¹

Over interstate commerce no such extensive authority has been claimed. The right to engage in such commerce is one of the rights reserved to the people, and one of the privileges and immunities of citizenship. Congress cannot lay an embargo upon interstate commerce, nor can it, in national matters, make restrictions of unequal operation among the States.² The purpose with which the grant was made — to secure freedom of transportation throughout the country unembarrassed by differing regulations at State lines — measures not only the power of the States, but also the power of Congress.

Over trade with the Territories the Federal power is less restricted. The Territories of the United States are not organized under the Constitution, but are the creation exclusively of Congress and subject to its control. The United States is the only government which can impose laws upon them, and it is held that Congress can forbid traffic with them in certain articles, and may vary its regulations to meet the special need of each locality.³

The Preference Clause.— It was perhaps considered by the framers of the Constitution that the nature and purpose of the commercial power granted to the Federal government rendered any express statement of this limitation unnecessary; but on the 14th of September, 1787, as one of the last acts of the Convention before its adjournment,— perhaps as a precaution against misconstruction, perhaps to relieve Southern apprehensions,— a clause was adopted providing

vol. 1, pp. 203, 204; *Wynhamer v. The People*, 20 Barb. 567; *United States v. The Brig William*, 2 Hall's L. J. 255. See note on Embargo Acts of 1807, 1809, 2 Stat. L., p. 451; *United States v. Marigold*, 9 How. 560.

¹ *United States v. Compagnie Francaise*, 77 Fed. Rep. 495.

² Opinion of Mr. Justice McLean in *Groves v. Slaughter*, 15 Pet. 449, 506.

³ *Endleman v. United States*, 86 Fed. Rep. 456.

that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."¹

At the time of the adoption of the Constitution, navigation was the only means of conducting commerce on a large scale. Regulation of navigation and the imposition of a tariff were the principal commercial regulations contemplated by the Convention, and it may well be that, in securing equal rights of navigation for all the States, it was considered that the field of Federal commercial regulation was practically covered by a provision which required uniform regulation in all national matters. It is probable that the construction which will be given to the clause will be in accordance with this broad purpose. Freedom of transportation from conflicting, discriminating and burdensome restrictions was the purpose of the Constitution; and while the language employed was almost necessarily such as referred to the means of transportation then in existence and within the knowledge of the Convention, nevertheless the operation of the Constitution is not confined to the instrumentalities of commerce then known, but keeps pace with the progress of the country, and is adapted to new developments of time and circumstance.²

Within a hundred years the means of transportation has so changed that the commerce among the States conducted by land is more important than that conducted by water. Provisions of the Constitution which at first were applied only to navigation may therefore now be applied to railways, as in the case of the clause which forbids the States from laying any duty of tonnage;³ and the same view may also be taken of the preference clause.

It is evident from the history of the origin and adoption

¹ Constitution of United States, 1, pp. 266, 270, 279, 280, 311, 375; art. 1, sec. 9; Madison's Journal of vol. 5, pp. 478, 483, 502, 545.

Convention, edited by Scott, pp. 610, ²Telegraph Co. v. Telegraph Co., 618, 647, 648; Elliott's Debates, vol. 96 U. S. 1.

³ *Ante*, pp. 196, 199, 225, 235.

of this clause that it was intended solely as a limitation upon the powers of Congress, and not of the States; and this is the view accepted by the courts,¹ though it has been said that it limits also the powers of the States.²

The preference clause was not violated by legislation of Congress during the rebellion, regulating commercial intercourse with the insurrectionary districts, requiring persons who conduct such commerce to take out a permit and to pay a tax upon imports into the sections in rebellion;³ nor by an ordinance of the city of Charleston imposing a tax on capital invested by its citizens in shipping;⁴ nor by a tonnage tax on vessels performing regular voyages to the port of Charleston from the States of North Carolina and Georgia, though none was imposed on vessels belonging to Georgia plying regularly within its limits.⁵

Control of Interstate Highways.—At an early period Congress exercised extensive jurisdiction in respect to waterways, the national highways of the country. Over railways, its first general legislation is in the act of June 15, 1866.⁶ For the purpose of Federal control these highways are subject to all requisite legislation by Congress. This power necessarily includes the power to keep them open and free from any obstruction by the States or otherwise; to remove such obstructions when they exist; to provide against the recurrence of the evil, and for the punishment of offenders. For these purposes Congress possesses all the power which existed in the States before the adoption of the National Constitution, and which has always existed in the Parliament of England.⁷

¹ *Munn v. Illinois*, 94 U. S. 118; *Baker v. Wise*, Governor, etc., 16 Gratt. 139; Opinion of Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 229.

² Opinion of Mr. Justice Wayne in *Passenger Cases*, 7 How. 283, 814.

³ *Folsom v. United States*, 4 Ct. of Claims, 366.

⁴ *State ex rel. Ravenal v. Charleston*, 4 Rich. (S. C. L.) 286.

⁵ *Alexander, Harbor Master, v. Wilmington R. R. Co.*, 3 Strobb. 594.

⁶ U. S. Rev. Stat., sec. 5258.

⁷ *In re Debs*, 158 U. S. 564, 586; *Gilman v. Philadelphia*, 8 Wall. 718,

724.

Most cases in which this power has been considered have involved the constitutionality of State statutes. The Federal power is not limited, however, to a control of the State, but extends to the removal of any obstruction in the way of the freedom of interstate commerce and the execution of Federal laws. This power may be exercised in appropriate cases directly by the executive branch of the government. "If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."¹

A striking instance of such necessity is found in the attempt, during the Kansas-Nebraska struggle, to prevent, by force, immigration to those Territories,² and is sometimes illustrated in periods of social disturbance. Without this power, the whole interest of the nation in commerce among the States would be at the mercy of a portion of the inhabitants of different States.

The Federal authority to protect commerce is not limited to the exercise of executive power, but may be exercised through the courts. Congress has legislated concerning the highways of the country,³ and the courts may enforce this

¹ *In re Debs*, 158 U. S. 564, 582.

² Cong. Rec., 34th Congress, 2d Session, pp. 12, 18, 41.

³ Waterways made post-roads, Act of June 8, 1872. See also Act of June 8, 1872, Rev. Stat., sec. 3964; Railroads authorized to engage in interstate transportation, Act of June 15, 1866, ch. 124, 14 Stat. L. 66, Rev. Stat. 5258; Regulation of transportation of live-stock, Act of March 3, 1873, ch. 252, 17 Stat. L. 584, Rev. Stat. 4386-4389; Transportation of diseased live-stock forbidden, Act of May 20, 1884, ch. 60, sec. 6, 28 Stat. L. 31, 32; Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. L. 879, with amendment of

March 2, 1889, ch. 382, 25 Stat. L. 855, and amendment of Feb. 10, 1891, ch. 128, 26 Stat. L. 743, and amendment of Feb. 8, 1895, 28 Stat. L. 643; Arbitration between railroads and employees, Act of Oct. 1, 1888, ch. 1063, 25 Stat. L. 501, Act of June 1, 1896; Combinations in restraint of trade, Act of July 2, 1890, ch. 647, 26 Stat. L. 209; Safety appliances, Act of March 2, 1893, ch. 106, 27 Stat. L. 581; Other highways: All public roads and highways declared post-roads, Act of March 1, 1884, 23 Stat. L. 3, Supp. Rev. Stat., p. 423; Act of June 8, 1872, Rev. Stat., sec. 3964; Telegraph companies, Rev. Stat., tit. LXV.

legislation, and secure freedom of commerce from unauthorized interference.¹

Federal Legislative Power May Not be Delegated.—The power to regulate commerce is given to Congress, and this legislative authority may not be delegated to any person or body, nor even to one of the States.² Congress cannot sanction a State law passed in violation of the Constitution, and if it can adopt such a law as its own, it must be one which it could enact.³

Congress may, however, in some cases, without delegation of power, establish the line of distinction between such local matters as are within the jurisdiction of the State, and those national matters which are subject to Federal regulation alone.⁴ Such legislation may be found in the Wilson Act;⁵ in the act subjecting certain explosives, in transportation from one State to another, to the jurisdiction of the several States within whose territorial limits they pass,⁶ and in acts which declare where the navigability of a stream ends.⁷ A Federal statute giving to a court power to fix the amount of tolls to be paid for the use of a bridge has also been sustained.⁸

The subject was considered at some length in *Field v. Clark*.⁹ That case concerned the validity of a provision of

¹ In re Debs, 158 U. S. 564. See Charge to Grand Jury, 62 Fed. Rep. 828; Charge to Grand Jury, 63 Fed. Rep. 834; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803; Charge to Grand Jury, 62 Fed. Rep. 840; United States v. Elliott, 63 Fed. Rep. 801; Charge to Grand Jury, 63 Fed. Rep. 436.

² Stoutenburg v. Hennick, 129 U. S. 141.

³ In re Rahrer, 140 U. S. 545, 560; Cooley v. Port Wardens, 12 How. 299; United States v. Dewitt, 9

Wall. 41; Gunn v. Barry, 15 Wall. 610, 623.

⁴ In re Rahrer, 140 U. S. 545; In re Spickler, 43 Fed. Rep. 653.

⁵ 26 Stat. L. 813, Supp. Rev. Stat., ch. 728, p. 779.

⁶ U. S. Rev. Stat., sec. 4280.

⁷ Conf. Act of July 18, 1868, Rev. Stat., sec. 5248.

⁸ Canada So. Ry. Co. v. International Bridge Co., 8 Fed. Rep. 190. Conf. Chicago, etc. R. Co. v. Dey, 35 Fed. Rep. 866.

⁹ 143 U. S. 649.

the act of October 1, 1890,¹ authorizing the President to suspend the free importation of certain articles when satisfied that the country producing such articles imposes upon similar American products exactions which he may deem unreasonable. Such provisions have been very common in the legislative history of the nation. The Embargo Acts of March 1, 1809,² and of March 10, 1810,³ contained provisions under which the President could suspend the operation of the act, and these provisions were sustained in the case of *The Brig Aurora*,⁴ upon the ground that Congress had not transferred legislative power to the President, but had enacted that in certain contingencies the law should be suspended, the President being made the means of determining whether or not the contemplated contingency had occurred. In *Field v. Clark* many other similar provisions were referred to, and it was the conclusion of the court, after this review of precedents, that in the judgment of Congress it was often desirable, if not essential, for protection against discriminating regulations of foreign governments, to invest the President with large discretion arising out of the execution of statutes relating to trade and commerce with other nations. In the tariff act under consideration the President was authorized, in case of hostile discrimination by other countries, to suspend the operation of the act permitting free introduction of certain articles; but Congress had prescribed in advance the duty to be levied upon such articles while the suspension lasted, and nothing was left to the President but to determine whether or not hostile discrimination was made. As the suspension was absolutely required when the President ascertained the existence of this fact, it could not be said that he exercised the function of law-making. "What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascer-

¹ 26 Stat. L., pp. 567, 612.

² 2 Stat. L. 528.

³ 2 Stat. L. 605.

⁴ 7 Cranch, 382, 388.

tain and declare the event upon which its expressed will was to take effect."¹

The test determining the validity of a delegation of discretionary power, therefore, appears to be that if the controlling rule is fixed by the legislature, and the power delegated is a power to apply this general rule to specific facts, or to determine some fact upon which the legislature makes its action depend, then the law is valid; but a statute which delegates a discretionary power to fix the rule by which conduct shall be judged or rights measured is unconstitutional.

It is competent for Congress, having authorized the construction of a bridge of a given height over a navigable water, to empower the Secretary of War to pass upon the details of construction so as to avoid unnecessary obstruction to commerce.² Congress may, in general terms, authorize the improvement of a navigable river, and removal of a wreck therefrom,³ leaving the details to the Secretary of War. It may authorize the construction of a bridge across a stream, leaving the Secretary of War to fix the point where the least obstruction to navigation will thereby be created;⁴ may require his approval of the plans of construction;⁵ and may delegate power to prescribe rules for the navigation and administration of canals owned or controlled by the United States.⁶

It may authorize the Interior Department to supervise and approve or disapprove contracts, made by whites with members of the Indian tribes, for the collection of claims;⁷ and it has been held that Congress may empower the President to regulate or prohibit the importation of distilled

¹ *Field v. Clark*, 143 U. S. 649, 698.

² *Miller v. New York*, 109 U. S. 385; *Miller v. New York*, 18 Blatch. 212; *People v. Kelley*, 76 N. Y. 475.

³ *Removal of Obstruction to Navigation*, 15 Op. Atty. Gen. 284; *United States v. City of Moline*, 82 Fed. Rep. 592.

⁴ *United States v. Milwaukee & St. P. Ry. Co.*, 5 Biss. 410, 420.

⁵ *Oregon City Trans. Co. v. Columbia Bridge Co.*, 53 Fed. Rep. 549; *Hatch v. Willamette Iron Bridge Co.*, 7 Sawy. 127, 141.

⁶ *United States v. Ormsbee*, 74 Fed. Rep. 207. *Conf. United States v. Eaton*, 144 U. S. 677.

⁷ *Rollins v. Eastern Band of Cherokee Indians*, 87 N. C. 220.

liquor into the district of Alaska;¹ and where Congress has authorized the construction of a bridge, it may determine the municipal law which shall govern its use.²

On the other hand, where a bridge has been built across a navigable river under authority of Congress, the Secretary of War cannot be authorized to require its removal if he believes it to be an obstruction to navigation,³ nor to require its alteration so as to make navigation free;⁴ for to permit such a delegation of power would be, in effect, to authorize the Secretary of War to repeal an act of Congress.

It seems that section 7 of the act of September 19, 1890,⁵ is, upon the strength of the cases referred to above, open to some question. That section forbids obstruction in navigable waters, or alteration of the channel of any navigable waters, unless the changes contemplated are first submitted to and approved by the Secretary of War. For the determination of the question so submitted the statute furnishes no general rule. Obstructions in navigable waters, except such as may be authorized by the Secretary, are prohibited, and in the power to be exercised by him no difference is made between minor obstructions and those which would seriously interfere with navigation. It may have been contemplated that, following a wise discretion, the Secretary would refuse to sanction serious obstructions, but no such limitation is placed upon his authority. The power delegated is to authorize any obstruction, complete or partial, in any navigable water of the United States.

Similar criticism may be made upon the authority given to the Interstate Commerce Commission to suspend the operation of that section of the act which is commonly known

¹ *The Louisa Simpson*, 2 Sawy. 57; *Endleman v. United States*, 86 Fed. Rep. 456; *United States v. Fifty Cases of Distilled Spirits*, 88 Fed. Rep. 1000.

² *Commissioners of Parks, etc. v. Common Council of Detroit*, 80 Mich. 668.

³ *United States v. Keokuk & H. Bridge Co.*, 45 Fed. Rep. 178.

⁴ *United States v. Keokuk & H. Bridge Co.*, 45 Fed. Rep. 178; *United States v. Rider*, 50 Fed. Rep. 406.

⁵ *Supp. Rev. Stat.*, vol. 1, p. 801, amended Act of July 13, 1892, 27 Stat. L., p. 110.

as the "long and short haul clause." This authority the Commission is authorized to exercise upon application by any interested carrier, in special cases, and after investigation.¹ Congress has not defined the circumstances under which a carrier should be relieved of the operation of this provision. The duty imposed upon the Commission is apparently to investigate all applications for relief and to grant a few. It does not meet the difficulty to say that all rates for interstate carriage must be reasonable and without discrimination, and that the Commission may suspend the clause only to effect this result; for such a construction would practically repeal the clause and leave the carriers subject to the single obligation to make their rates reasonable and without discrimination in all cases.

The act of March 2, 1893,² requiring all common carriers engaged in interstate commerce to equip their cars and locomotives with certain safety appliances, provides that the Interstate Commerce Commission may, from time to time, upon full hearing and for good cause, extend the period within which any carrier shall comply with its provisions.

No attempt is made in the act to define the phrase "good cause." The delegation of power is in general terms, and apparently authorizes the Commission to take into consideration any cause which Congress itself might have considered in fixing the day when the law should take effect. If this grant of power can be sustained, it would seem that the Commission might be authorized, "upon good cause," to advance the operation of a statute, making it take effect before the day fixed by Congress, to suspend its operation after it had gone into effect, or even to repeal it.

Internal Improvements.— Practical administration of the government has long settled in favor of the Federal government the question of its power to authorize internal improvements. For the purpose of carrying its constitutional powers into effect, Congress may incorporate railroad, bridge and

¹ Act February 4, 1887, Supp. Rev. ² 27 Stat. L., ch. 196, p. 531.
Stat., p. 530.

highway companies,¹ with power to engage in commerce among the States, and to condemn private property within a State.²

The United States may make surveys of the coast, rivers and harbors,³ and for this purpose may authorize entry upon private property upon making compensation therefor;⁴ it may condemn land within the limits of a State by proceedings in a Federal court,⁵ or by authority of the State in a

¹ *Pacific Removal Cases*, 115 U. S. 1; *California v. Pacific Ry. Co.*, 127 U. S. 1; *Cherokee Nation v. So. Kansas Ry. Co.*, 135 U. S. 641; *Luxton v. North River Bridge Co.*, 153 U. S. 525. For discussion concerning Federal power to construct Cumberland Road, see Schouler, *Hist. U. S.*, vol. III, pp. 248-254, 295, 445; Views of President Monroe upon internal improvements, inclosed in message to Congress, May 4, 1822.

² *Luxton v. North River Bridge Co.*, 153 U. S. 525; *Stockton v. Baltimore & N. Y. Ry. Co.*, 32 Fed. Rep. 9; *Chesapeake & Ohio Canal Co. v. Union Bank of Georgetown*, 4 Cranch (C. C.), 75; *Cherokee Nation v. So. Kansas Ry. Co.*, 33 Fed. Rep. 900; *Cherokee Nation v. So. Kansas Ry. Co.*, 135 U. S. 641. *Conf. Postal Tel. Co. v. Morgan's Railway Co.*, 49 La. Ann. 58.

³ *United States v. Rhodes*, 1 Abb. 28, 49.

⁴ *Orr v. Quimby*, 54 N. H. 590.

⁵ *Kohl v. United States*, 91 U. S. 367; *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. Rep. 525. See *In re Petition of United States*, 96 N. Y. 237. *Conf. Trombley v. Humphrey*, 23 Mich. 471.

Act of August 1, 1888, to authorize condemnation of land for pub-

lic buildings, etc. 25 Stat. L. 327, Supp. Rev. Stat., ch. 723, p. 601.

On the construction of this act, see 45 Fed. Rep. 396; 19 Op. Atty. Gen. 673. As to its effect as declaratory of powers already possessed by the officers named, see *Kohl v. United States*, 91 U. S. 367; 16 Op. Atty. Gen. 329; 17 Op. Atty. Gen. 509; 18 Op. Atty. Gen. 352. As to damages recoverable in such cases, see *Alexander v. United States*, 25 Ct. of Claims, 87, 329; *Wetzel v. United States*, id. 277.

The following additional instances of Federal laws authorizing the exercise of the power of eminent domain are cited in a note in Supp. Rev. Stat., ch. 723, p. 601:

Rev. Stat., secs. 4870-4872, authorizing the Secretary of War to purchase land for national cemeteries, or obtain the same by appraisement and payment, after application to proper circuit or district court.

Act of March 3, 1875, ch. 130, par. 2, Supp. Rev. Stat., p. 72, authorizing the Secretary of the Treasury to acquire, by donation or purchase, the right to occupy sites for life-saving stations, etc.

Act of March 3, 1883, ch. 143, par. 1, Supp. Rev. Stat., p. 420, authorizing the Secretary of the Treas-

State court;¹ but in all cases the right to just compensation for the property taken is so inseparably connected with the right of condemnation that it may be said to exist not as a separate principle, but practically as part of the right of condemnation.²

Federal Power to Incorporate a Bank.—It has long been established that Congress may incorporate a bank to act as a fiscal agent for performance of governmental functions.³ It is possible, also, that such action may be taken under the general power to regulate commerce.

The view that Congress is without authority to regulate the means of exchange implies that commerce, as the word is used in the Constitution, is limited to barter and cash sales,

ury to acquire land for public buildings and light-houses by private purchase or condemnation, and to defray the expenses incident to the procuring of sites from the appropriations for the construction of the buildings. See 18 Op. Atty. Gen. 174, 484.

Act of April 24, 1888, ch. 194, Supp. Rev. Stat., p. 584, authorizing the Secretary of War to cause proceedings to be instituted for the condemnation of any land, right of way or material required for the improvement of rivers and harbors, or, in his discretion, to purchase the same or accept donations of land or materials.

Act of August 18, 1890, ch. 797, Supp. Rev. Stat., p. 780, authorizing the Secretary of War to cause proceedings to be instituted for the condemnation of land or right pertaining thereto, for fortifications and coast defenses, or to purchase the same or accept donations of such lands or rights. See 45 Fed. Rep. 546.

See also Act of July 13, 1892, 27 Stat. L. 102, providing for condemnation of land for improvements at the mouth of the Yazoo river; the proceeding to be governed by the laws of the State of Mississippi as far as applicable to condemnation of private property for public use.

¹ In re Petition of United States, 96 N. Y. 227, affirming 67 How. Prac. 121; United States v. Jones, 109 U. S. 518; Jones v. United States, 48 Wis. 385; Gilmer v. Lime Point, 18 Cal. 229; Burt v. Merchants' Ins. Co., 106 Mass. 356; United States v. Dumplin Island, 1 Barb. 24. *Contra*, Trombley v. Humphrey, 23 Mich. 471.

² Monongahela Navigation Co. v. United States, 148 U. S. 818; Pumpselly v. Green Bay Co., 18 Wall. 166, 178.

³ Hist. of U. S. Bank, by Clarke & Hall (Gales & Seaton, Washington, 1892); McCulloch v. Maryland, 4 Wheat. 316; Osborne v. Bank of United States, 9 Wheat. 788.

without the use of the great modern agency of credit. This is clearly not true. The powers conferred on Congress keep pace with the progress of the country and adapt themselves to new developments of time and circumstance.¹

Under present conditions a bill of exchange is essential to most of the larger operations of commerce. Regulations occasioning but a slight rise in the price of exchange might embarrass or ruin commercial operations which would otherwise be conducted with profit, and removal of impediments to free exchange may open new channels of trade and increase existing trade. It is admitted that a bill of exchange is as much an instrument of commerce as is money itself.²

It may be, therefore, that the creation of a bank has so intimate a relation to purposes within the Federal jurisdiction as to come within the commercial power of Congress.³

TRADE-MARKS.

By the act of July 8, 1870,⁴ Congress provided for the registration of trade-marks for exclusive use within the United States, and, by a subsequent statute, counterfeiting a registered trade-mark was made criminal.

These statutes were not limited in their operation to trade-marks used in interstate or foreign commerce. Trade-marks, it was argued, are not of local but of general interest, and for efficiency require uniformity of regulation. It might be admitted that in the single instance of an article bought and sold in one State only, so that its trade-mark never crossed State lines, the United States would have no jurisdiction; but in all other cases the injury done by fraudulent trade-marks would not be limited to a single State, but would ex-

¹ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

² *Nathan v. Louisiana*, 8 How. 73.

³ House Report No. 3054, 54th Congress, Second Session: House Report No. 985, 52d Congress, First Session. See Discussion in Senate

on Incorporation of International American Bank, June 13-18, 1898, Cong. Rec., vol. 31, pp. 6538-6548, 6609, 6623-6632, 6708-6710. See *ante*, pp. 46-49.

⁴ Rev. Stat., secs. 4937-4947.

tend to every market where goods simulated under the false device are sold. This argument was disapproved by the Supreme Court.¹

It was doubtful, the court said, whether trade-marks could be the subject of Federal control even where that control was limited to interstate and foreign trade. "Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property."² It was therefore left undecided whether a trade-mark bears such a relation to commerce as to bring it within congressional control, even when applied to interstate and foreign commerce. It was clear, however, the court said, that Congress had no jurisdiction over trade-marks used solely in domestic commerce, and for this reason the statute was unconstitutional.

In 1881 Congress passed the present statute in relation to trade-marks, limiting its operation to such marks as are used in commerce with foreign nations or with Indian tribes,³ and this statute is sustained. It seems, also, that it may operate upon goods before they become subjects of transportation, the suggestion being that, if intended for exportation, the trade-mark may be within Federal protection.⁴

THE FEDERAL ANTI-TRUST LAW.

The act of July 2, 1890,⁵ commonly known as the Sherman Anti-Trust Law, by its first section forbids any contract or combination in the form of trust or otherwise in restraint of trade or commerce among the States or with foreign nations,

¹ Trade-mark Cases, 100 U. S. 82; ² Act of March 8, 1881, 21 Stat. L. 502, Supp. Rev. Stat. 322.
Leidersdorf v. Flint, 8 Biss. 327.

³ Trade-mark Cases, 100 U. S. 82, ⁴ Ryder v. Holt, 128 U. S. 525.
95.

⁵ 26 Stat. L., p. 209, Supp. R. S. 762.

and makes violation of this act a misdemeanor. The second section makes it also a misdemeanor to monopolize trade or commerce among the several States or with foreign nations. The third section extends the prohibition of the first section to contracts in restraint of trade or commerce between Territories, States and Territories, and Territories and foreign nations. The fourth section gives to the circuit courts of the United States jurisdiction to prevent or restrain the violation of the act, and makes it the duty of the district attorneys in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent or restrain such violation. In the exercise of this jurisdiction it is provided by section 5 that the court before which proceedings are pending may, in its discretion, cause parties to be summoned, whether they reside in the district in which the court is held or not. Section 6 enacts that any property owned under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in the first section of the act, and in transportation from one State to another, or to a foreign country, shall be forfeited to the United States by like proceedings as provided for condemnation of property imported into the United States contrary to law.

Section 7 gives to any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden by the act, the right to sue in the Circuit Court of the United States in which the defendant resides or is found, without reference to the amount in controversy, and to recover treble damages, with costs and attorney's fees.

It will be noticed that the provision of section 6 relating to forfeiture of property applies to goods in transit from State to State or to foreign countries. The statute which relates to the importation of articles under contracts in restraint of trade from foreign countries is in section 73 of the Tariff Act of August 27, 1894,¹ and is substantially similar

¹28 Stat. L., ch. 349, p. 570. See Act of July 24, 1897, sec. 34.

to the statute of 1890, except that it prohibits contracts in restraint of lawful trade, or free competition in lawful trade and commerce.

The Extent of the Prohibition.—The first interpretation placed upon the act of July 2, 1890, was that it forbade only such contracts in restraint of trade as were unenforceable at common law. It was said that when Congress creates an offense and uses common-law terms, the courts may properly look to that body of law for the true meaning of the terms used, and for the definition of the offense. At the time that the Anti-Trust Act was passed, the rule had become established in the jurisprudence both of England and of the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction, and in the early cases this rule controlled the interpretation of the statute.¹

In *United States v. Freight Association*² the doctrine was announced that the law prohibited all restraints of trade, and not those alone which were illegal at common law.

The statute, it was said, is general, and forbids every contract in restraint of trade. To construe this broad prohibition so as to make it cover only those contracts which unreasonably restrain trade would read into the act a limitation not inserted by Congress. The common law recognized two classes of contracts which were in restraint of trade: those in which the restraint was unreasonable and those in which it was reasonable. When Congress used this language and prohibited all contracts in restraint of trade, without exception or limitation, the court must apply that prohibition without inserting exceptions which were omitted by Congress.

From this decision Mr. Justice White, Mr. Justice Field,

¹ *United States v. Trans-Missouri* *Iron, etc. Ry. Co.*, 78 Fed. Rep. 488; *Freight Ass'n*, 58 Fed. Rep. 58, 58 *Dueber Watch Co. v. Howard* Fed. Rep. 440; *United States v. Watch Co.*, 55 Fed. Rep. 851. *Joint Traffic Ass'n*, 76 Fed. Rep. 895; *Prescott, etc. Ry. Co. v. Atch-*

² 166 U. S. 290.

Mr. Justice Gray and Mr. Justice Shiras dissented. In delivering the opinion of the minority, Mr. Justice White called attention to two conceded propositions: that only such contracts as unreasonably restrain trade were violative of the common law, and that the contract involved in the case under consideration imposed no unreasonable restraint on trade. To hold that Congress had prohibited a reasonable contract was therefore tantamount to an assertion that the act of Congress was itself unreasonable. "The difficulty of meeting, by reasoning, a premise of this nature, is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason."

It is perhaps true that the principle by which contracts in restraint of trade were held to be illegal was first understood to embrace all contracts which in any decree accomplished these results. "But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed." Hence arose the distinction that where contracts operated only as a partial restraint they were not, in contemplation of law, contracts in restraint of trade. This appears to be recognized in the title of the Federal statute, which is "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

In *Gulf, etc. R. R. Co. v. Miami S. S. Co.*,¹ the Court of Appeals of the Fifth Circuit showed an inclination to return to the interpretation of the statute which obtained before the Freight Association decision. In this case it was held that railway companies doing business at Galveston could lawfully combine to give their business to one of two steam-

¹ 86 Fed. Rep. 407.

ship companies operating between that port and New York, and, by requiring the prepayment of freight and refusing to join in through bills of lading, to withhold their business, so far as possible, from the other steamship company. A common carrier, it was said, is not bound to carry beyond its own line, and if it contract to do so it may, in the absence of statutory regulations, determine for itself what agencies it will employ. The suggestion in the argument of the court appears, therefore, to be that the companies could combine to exercise the right which belonged to each company separately. This theory is clearly at variance with the present rule.¹ Each company which was a member of the Trans-Missouri Freight Association had the right, and was under the duty, of establishing reasonable rates, but it was not at liberty to combine with other companies to fix rates without the restraining influence of competition.²

The operation of the act is limited to those contracts which are actually in restraint of trade. A person who has given service or property to another is not, by this statute, forbidden to recover fair compensation therefor, although at the time of the service or sale he may have been a member of an illegal combination.³ So in the Miami Steamship Company case it was held that the separate contracts made by the railway companies with the steamship company were valid,⁴ although they were made in performance of an illegal combination.

The Operation of the Act Includes Railroads.—It was argued also that the Anti-Trust Act was not intended to oper-

¹ *United States v. Hopkins*, 82 Fed. Rep. 529. Conf., also, the following authorities in which the statute was not involved: *Jackson v. Stanfield*, 187 Ind. 593; *Curran v. Galen*, 153 N. Y. 83; *Vegelahn v. Guntner*, 167 Mass. 92; *Bohn Mfg. Co. v. Northwestern Lumbermen's Ass'n*, 54 Minn. 233; *Macauley v. Tierney*, 19 R. I. 255; *Allen v. Flood*,

House of Lords, Dec., 1897; 11 *Harvard Law Review*, 449; *Chitty on Contracts* (11th Am. ed.), vol. 2, p. 983; *Wald's Pollock on Contracts*, p. 810.

² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290.

³ *The Charles E. Wisewall*, 86 Fed. Rep. 671, 74 Fed. Rep. 802.

⁴ 86 Fed. Rep. 407.

ate upon the business of transportation, but upon the mercantile business of the country, and to cover a field which had not been covered by the Interstate Commerce Act. The Anti-Trust law is a general statute, and "no rule is better settled than, where a general statute has been enacted, which might include, in the absence of other provisions, a subject-matter which has already received consideration at the hands of the legislature by a special act, the general act will not be construed to embrace the subject contained in the special act, unless it clearly appears from the language employed that it was the intention of the legislature that it should be included."¹

That it was not the intention of Congress to include the business of transportation within the act, it was said, appeared from a comparison of the statutes. The execution of the Commerce Act is in the hands of the Commission, while the Anti-Trust law makes no reference to the Commission, imposes no duty upon it, and is enforced by the Attorney-General.

In their detail, too, it was said, the laws were without reference to each other. To make both acts cover the same field would bring railway pooling within the penalties of both; and if the latter act were to prevail it would repeal the provision of the Interstate Commerce Act making each day of the continuance of a railway pool a separate offense, and would substitute the rule of the Anti-Trust law, which makes the offense a single instead of a daily crime. A similar inconsistency between the acts is found in the provisions which relate to the remedy of individuals injured by their violation. Under the Interstate Commerce Act, compensatory damages only are given in such cases, while under the Anti-Trust Act treble damages and attorney's fees are allowed.

In *United States v. Freight Association*² this argument was considered by the Supreme Court and overruled. While

¹ *United States v. Trans-Missouri Freight Ass'n*, 58 Fed. Rep. 440, 455. ² 106 U. S. 290.

there is a difference, it was said, between corporations for trade and those organized for transportation, nevertheless all are engaged in commerce, and there is no reason why a railroad company should not be included in general legislation aimed at the prevention of that kind of crime in restraint of trade, which may exist in all cases, which is substantially of the same nature wherever found, and tends in every case toward the same results. It is entirely appropriate to subject corporations, or persons in trade or manufacture, to different rules from those applicable to carriers, when the circumstances are different; but when the evil to be remedied is the same, there is no reason why the same rule should not be applied to both cases.

Restraint of Trade by Labor Unions.—In an early case it was considered that the Anti-Trust Act applied only to such conspiracies as seek to engross or monopolize the market, and not to combinations to drive competitors out of the field by annoyance, intimidation or otherwise.¹ This construction has not been followed. The means by which a restraint may be effected — whether by contract, by violence or intimidation — is immaterial. All restrictions upon interstate and foreign commerce are prohibited.

In its application to labor troubles, the statute was first considered in *United States v. Workingmen's Council*.² In this case a dispute which had arisen between warehousemen at New Orleans and their employees had resulted in concerted action by a large number of labor associations in the city to prevent the employment of non-union men. To effect this compulsion the associations enforced a discontinuance of labor in all kinds of business in New Orleans, including the transportation of goods and merchandise from State to State and to and from foreign countries. In some branches of business the effort was made to replace the striking men by other workmen, but this was resisted by the intimidation

¹ *United States v. Patterson*, 55 Fed. Rep. 605. ² 54 Fed. Rep. 994, 1000.

springing from large crowds of union men assembling in the streets, and in some instances by violence, so that transportation was effectually stopped.

The question whether these facts made out a case within the statute was, the court said, tantamount to the question whether there could be a case under the statute. "It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—*i. e.*, when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country."

In *United States v. Elliott*¹ the bill made a number of officers of a labor organization defendant, and charged that they had combined to prevent railroads radiating from St. Louis from conducting their customary business of transportation between points in Missouri and other States; that they induced persons employed by the railway companies to leave the service; that they had issued orders directing members of their organization to cease operating trains of the companies in whose service they were employed, and that they had asserted a purpose to prevent any operation by the railways which refused to accede to certain demands. Such a combination, the court said, was within the fair intent of the act of 1890. An organization whose object is to prevent the operation of important railroads until they have acceded to certain demands made upon them, whether these demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of interstate commerce. A preliminary injunction was therefore granted under the statute, to restrain further violation of the law by the defendants. Upon argument of a demurrer to the bill, the case

¹ 63 Fed. Rep. 801.

was again considered and the former decision affirmed.¹ The statute, it was said, declares every act of combination in restraint of trade or commerce among States, or with foreign nations, illegal, and this prohibition includes any restriction or hindrance created by application of external force. The fact that the bill charged the commission of acts which when done would be crimes does not limit the jurisdiction granted to the courts. The law would be very imperfect if a number of irresponsible men could conspire to destroy property and interrupt commerce, and nevertheless be beyond the reach of the only order by which the courts could give adequate protection.

Similar decisions have been rendered in a number of other cases.² In *United States v. Debs*³ the same rule was followed after a very full consideration of the statute. In its nature, Judge Woods said, the act could not apply to one class of monopolies alone. Suppose, for example, some manufacturers of sleeping cars, competing with the Pullman company, should, in their own interests, combine with railroad employees to prevent the use of Pullman cars,—would it not be evident that the combination would, in any view of the statute, be within its terms? But if the officers or agents of car companies, who might or might not be capitalists, are indictable for such offense, how could their fellow conspirators be exempt? Can workingmen acting by themselves, upon their own motion, and for their own purpose, whether avowed or secret, do things forbidden by the statute, without criminal responsibility, and yet be criminally responsible for the same things done at the instance of others, and to promote purposes not their own? or will it be said that under this statute one who is not a capitalist may, without criminality,

¹ *United States v. Elliott*, 64 Fed. Charge to Grand Jury, 62 Fed. Rep. 37.

² *Thomas v. Cincinnati Ry. Co.*, 62 Fed. Rep. 803; *United States v. Agler*, 62 Fed. Rep. 824; Charge to Grand Jury, 62 Fed. Rep. 828; *United States v. Cassidy*, 67 Fed. Rep. 698. ³ 64 Fed. Rep. 724.

assist capitalists in the doing of things which on their part are criminal?

Such questions, which must arise if the statute is given partial operation, show that it is the character of the act committed, and not of the defendant, which fixes guilt or innocence under the statute. The law condemns combinations, not only when they take the form of trusts, but in whatever form they may be found, if they restrain trade.

In this case the defendants were adjudged guilty of contempt of court in violating an injunction, and this order was approved by the Supreme Court upon application for a writ of *habeas corpus*, but without basing its decision on the statute.¹

The Line Between State and Federal Authority.—The Federal statute is limited in its operation to those subjects which are within Federal jurisdiction. It cannot operate upon the internal commerce of a State,² but begins when interstate or foreign commerce begins, and ends when that commerce ceases. It does not apply to the production, control or disposition of property except in their relation to interstate or foreign commerce.

In *United States v. E. C. Knight Co.*³ this principle was applied to the case of a corporation which had acquired nearly complete control of the manufacture of refined sugar within the United States. The corporation was organized under the laws of New Jersey, and owned all the sugar refineries in the country except five. In March, 1892, by the issue of additional stock, it acquired the capital stock of four of these companies, and thereupon a bill was filed by the United States against the purchasing company and the four companies which had sold out, charging the defendants with conspiracy, in violation of the act of July 2, 1890, and pray-

¹ In re Debs, 158 U. S. 564.

² 156 U. S. 1, 17, aff'g 60 Fed. Rep.

³ *National Distilling Co. v. Cream* 308, Id. 284; *Merz Capsule Co. v. City Importing Co.*, 96 Wis. 352; *United States Capsule Co.*, 67 Fed. The *Charles E. Wisewall*, 74 Fed. Rep. 414. Rep. 802, 86 Fed. Rep. 671.

ing an injunction to prevent the further performance of the agreements. In delivering the opinion of the court, Mr. Chief Justice Fuller said that the object of the combination was manifestly private gain in the manufacture of sugar, but not the control of interstate or foreign commerce. "It is true that the bill alleged that the products of these refineries were to be sold and distributed among the several States and that all the companies were engaged in trade or commerce with the several States and with foreign nations, but this was no more than to say that trade and commerce served manufacturer, to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for re-sale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by companies to other States for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In *Re Greene*¹ a similar decision was rendered by Judge Jackson, afterward of the Supreme Court of the United States. This was a petition for a writ of *habeas corpus* to release the petitioner from custody of the United States marshal, by whom he was held under a warrant of a commissioner, awaiting an order for his removal to the District of Massachusetts, to answer an indictment for alleged violation of the act. The first count of the indictment charged that Greene, and others in several States, had combined to restrain trade and commerce in distillery products, and that for this purpose they had organized a corporation known as the Distilling & Cattle Feeding Company, which had obtained control, by purchase or lease, of a large part of the distilleries in the United States; that these distilleries at the

¹ 59 Fed. Rep. 164. To same effect, *United States v. Greenhut*, 50 Fed. Rep. 205; *In re Terrell*, 51 Fed. Rep. 218. Fed. Rep. 469; *In re Corning*, 51

time of their purchase were in competition; that their product amounted to seventy-five per cent. of all of the distillery products made and sold in the country, and that by control of these plants the petitioner and his associates were enabled to control the market in these articles, and to control and fix the price at which dealers would sell to citizens of the several States; that in pursuance of this plan the Cattle Feeding Company made a sale at the city of Boston, within the District of Massachusetts, of a large amount of alcohol, then within the State of Illinois; that by reason of the control of the market in the United States, the vendor fixed the price at which the purchaser should and did sell the alcohol within the District of Massachusetts, and compelled the purchaser to sell alcohol at no less price than that so fixed.

The other counts of the indictment were substantially similar so far as jurisdiction was concerned.

In passing upon the questions thus presented, Judge Jackson said that while Congress may place restrictions upon the rights of corporations organized under its authority, to acquire, use and dispose of property, and may also impose restrictions upon citizens in respect to the exercise of a public privilege or franchise conferred by the United States, it may not limit or restrict the rights of corporations created by the States, or the citizens of the States, in the acquisition, control and disposal of property. "Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions, of persons in the acquisition and control of property, which the States of their residence or creation, sanction and permit. It is not material that such property, or the products thereof may become the subject of trade or commerce among the several States or with foreign nations." The Federal jurisdiction begins when the article is actually delivered to a carrier for transportation, or when its movement to another State is

actually commenced, and ends when the article reaches another State and becomes mingled with the general mass of property there.

After transportation of commodities from one State to another has ceased, and they have become mingled with the general mass of property in the State of destination, their subsequent disposition by sale, use or consumption is not part of interstate commerce. So, where a brewing company shipped beer from Wisconsin into Texas, the contract of sale containing a provision that the purchaser should deal only in the seller's beer, and that the seller would not dispose of beer to any dealer in competition with the buyer, it was held that the first of these provisions operated upon the parties after the delivery of the beer in Texas, and brought the contract within the State law against monopolies, which prevented any recovery for the purchase price.¹

The report of the case strongly suggests, though it does not clearly show, that the buyer was engaged in retail trade, and that the expressions of the court were made with reference to this accepted fact. In *Waters-Pierce Oil Co. v. State*² the same subject was again considered, and it was held that State laws against monopolies could not operate upon the sale of imported goods in original packages, but only where the package had been broken or the goods had passed from first hands.

But where a contract to buy, sell or exchange goods to be transported among the several States operates to restrain trade, it is in violation of the Federal law. The purchase, sale or exchange of commodities is as much a part of interstate commerce as is transportation itself; and if a combination of persons to prevent movement across State lines may be prevented by the Federal authorities, so may also a combination to prevent dealing in commodities for transporta-

¹ *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298; s. c. (Tex. Civ. App.), 86 S. W. Rep. 479. ² *Waters-Pierce Oil Co. v. State*, 44 S. W. Rep. 986. (Tex. Civ. App.), 44 S. W. Rep. 986.

tion. In *United States v. Jellico Mountain Coal & Coke Co.*¹ a petition was filed under the act against the members of the Nashville Coal Exchange. The membership of this exchange consisted of mining companies operating mines in Kentucky and Tennessee, and of persons and firms dealing in coal at Nashville. The purpose of the exchange, among other things, was to establish prices at which coal should be sold in that city, and to fix the share of the mine owners and dealers in the proceeds. Mine operators who were members of the exchange were prohibited from selling coal to any person in Nashville not also a member, and dealers were prohibited from buying coal from operators who were not members. This contract, the court said, was within the prohibition of the statute. Most of the coal mines were in Kentucky. The coal was to be mined for a certain price, and the agreement contemplated its shipment to Nashville. Its transportation was a necessary incident to the agreement, and without it execution would have been impossible. It was to all intents and purposes trade among the States, and so conducted as to evidence an intent to monopolize a part of this trade.

*United States v. Addyston Pipe & Steel Co.*² was a proceeding in equity begun by petition filed by the Attorney-General on behalf of the United States, against six corporations engaged in the manufacture of cast-iron pipe, charging them with a combination in violation of the act of 1890. It was shown that the defendant companies entered into a combination to raise the price of pipe for all States west and south of New York, Pennsylvania and Virginia. Their joint output was two hundred and twenty thousand tons, while the total capacity of all the other pipe manufacturers was one hundred and seventy thousand five hundred, of which an important part was manufactured at places so far distant from the places of considerable demand that necessary freight rates excluded competition. The mills of the defendants

¹ 46 Fed. Rep. 482; *United States v. Coal Dealers' Ass'n*, 83 Fed. Rep. 252. ² 78 Fed. Rep. 712.

were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. Custom required the seller to deliver the pipe at the place where it was to be used by the buyer, and to include in the price the cost of delivery. Under the agreement every request for bids was submitted, except in the case of certain cities which were "reserved" for particular members of the combination, to the central committee, which fixed a price and awarded the contract to the member which would agree to pay, for the benefit of the other members of the association, the largest bonus. The contract of association restrained every defendant, except the one selected to receive the contract, from soliciting in good faith, or making, a contract for pipe with the intending purchaser, and restrained the defendant so selected from making the contract except at the price fixed by the committee. The Circuit Court held that the case was not within the Federal jurisdiction. In the Circuit Court of Appeals this judgment was reversed, an exhaustive and careful opinion being rendered by Judge Taft, Mr. Justice Harlan and Judge Lurton concurring.¹

It is apparent, the court said, that in the case of pipe to be purchased in any one of the thirty-six States within the territory covered by the contract, each defendant, by his conduct, restrained his freedom of trade in respect to making a contract in that State for the sale of pipe to be delivered across State lines; five of the six defendants agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. No sale could therefore be suggested within the scope of the contract with respect to which it did not restrain some of the parties thereto from the exercise of the freedom, which but for the contract would have been theirs, of selling in one State pipe to be delivered from another State, at any price which they might see fit to fix. Such a contract was clearly, the court said, in restraint of interstate trade and commerce.

In *United States v. Hopkins*² the rule was applied to an

¹ 85 Fed. Rep. 271.

² 89 Fed. Rep. 520.

association of brokers dealing in cattle. The business of the Stock Yards Company, at the place where the association was located, consisted in loading and unloading stock from cars, and in caring for them while in public market. Cattle were sent to the yards from all cattle-raising States in the West, and many were subsequently shipped to other States and to foreign countries. Notwithstanding these facts, it has been held, following the rule of *Munn v. Illinois*,¹ that the business of the Stock Yards Company was of a local nature, and in the absence of Federal legislation the State statutes regulating charges for its services were sustained.²

Buyers and sellers of live-stock naturally congregate at such a place, and the association in question was an organization composed of about three hundred persons dealing in live-stock upon commission.

Their business consisted in soliciting shipments of cattle from stock-raisers in other States, in receiving the cattle sent to them, and causing them to be cared for by the Stock Yards Company, and in negotiating sales, at the yards, to local and foreign dealers.

The rules of the association fixed the price which the members should charge for these services, and in other ways regulated the manner in which the business should be transacted. Such a combination, the court said, was forbidden by the Federal statute.

The business of the brokers in making contracts for shipment of cattle to them from other States was clearly interstate commerce, and their services in negotiating sales, whether rendered before or after the cattle had arrived at the yards, were analogous to the services rendered by a drummer, and as much a part of interstate commerce as was the transportation itself. When it was shown that the association was engaged in interstate commerce, and that their rules were in restraint of trade, it followed that the

¹ 94 U. S. 113.

ting v. Kansas City Stock Yards

² *Cotting v. Kansas City Stock Co.*, 82 Fed. Rep. 850.
Yards Co., 79 Fed. Rep. 679; *Cot-*

organization was within the statute. It was immaterial, the court said, that their rules might be reasonable; for the act of Congress is aimed against all restrictions of interstate commerce, and to permit commerce among the States to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies or monopolies whatsoever.

Radical Nature of the Present Rule.—The foregoing review of the decisions shows the radical nature of the rule by which the Federal statute is now applied. It matters not how innocent a combination may be in purpose or beneficial in effect,—if it restrain interstate or foreign commerce it is prohibited. “This act of Congress is aimed against all restrictions of interstate commerce, and we need not discuss the reasonableness of such restrictions.”¹

Under this rule an organization of laborers which seeks by peaceful and proper means to maintain a reasonable standard of wages or proper hours of labor becomes illegal as soon as it falls within the Federal jurisdiction.

The large number of mercantile exchanges and boards of trade throughout the country show the demand for some organization by which buyers and sellers can be brought together, and experience shows the necessity, in such cases, of having a known standard by which commissions and other charges may be fixed. Any rule which would make such organizations illegal would cause great embarrassment to the commercial intercourse of the country.

If the statement of the doctrine given by the courts be accepted literally, and every contract which in any degree restricts interstate commerce be illegal, it would seem that the formation of partnerships or corporations would be forbidden.²

As a practical matter, no such application of the statute is possible, and, if it were, a rule which prohibited reasonable contracts would probably be unconstitutional as in violation

¹United States v. Hopkins, 83 Fed. Rep. 529, 537.

²Conf. United States v. Addyston Pipe & Steel Co., 85 Fed. Rep. 271.

of the fifth amendment to the Constitution. In construing the similar provisions in the fourteenth amendment which limit the powers of the States, it has been held that the constitutional right to liberty includes not only the right to be free from physical restraint, but also the right to the free enjoyment of one's faculties, to pursue any proper avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to these ends.¹

Some modification of the present rule seems, therefore, to be inevitable. What that modification will be is a difficult question. In *United States v. Addyston Pipe & Steel Co.*² the Circuit Court of Appeals seems to have acknowledged these difficulties so far as to base its decision upon common-law grounds, not upon the absolute rule of the *Trans-Missouri Freight Association* case.

In considering the condition of the common law upon the subject, the court, after a learned review of the cases and principles, concludes that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

This distinction affords some practical relief from a rule which otherwise would have been intolerable. It finds a justification for the contract by which a partner binds himself not to engage in the same business in such a way as to injure the firm, while at the same time it is not in conflict with the decision of the Supreme Court upon the facts in the *Trans-Missouri* case. The difficulty with this theory, however, is that it amounts to a little more than an announcement that, in these cases, the end may justify the means,—that that which is illegal in itself, both at common

¹ *Algeyer v. Louisiana*, 165 U. S. N. Y. Sup. Ct., Appellate Div., decided May 6, 1896, 51 N. Y. Supp. 578.

² 85 Fed. Rep. 871; *Brett v. Ebel*, 578.

law and by statute, is permitted when it is "merely ancillary to the main purpose of a lawful contract." In the second place, the rule presents a difficulty in that it does not go far enough to answer the public necessity. Many instances might be named in which restriction of competition is the principal purpose of a contract, which, nevertheless, the best interests of the public demand.

On the other hand, there are difficulties in the way of adopting any rule by which the validity of a contract would depend alone upon the view which a court might take of its reasonableness.

Injunctions to Restrain Violations of the Act.—The statute gives individuals no new right to bring suits in equity, and authorizes issuance of injunctions only in suits brought by the United States.¹ Combinations in restraint of trade are, however, by the act made unlawful; and where such a combination threatens irreparable injury under circumstances which, upon general principles of equity, authorize the relief, an injunction will be granted.² A court cannot, by virtue of this statute, grant a mandatory injunction by which persons will, in effect, be compelled to enter into contracts. Thus, in *Gulf, etc. R. R. Co. v. Miami S. S. Co.*³ it was held that the fact that a number of railroads had united to withhold their business so far as possible from a steamship company, and had entered into traffic arrangements with a rival company, did not authorize the court, for the purpose of preventing discrimination, to compel the railroads to make with the complaining company contracts similar to those which they had made with its competitor.

Relation of Wilson Act to State Statutes Against Monopolies.—The Wilson act was one of the consequences of the

¹ *Blindell v. Hagen*, 54 Fed. Rep. 40; *Hagen v. Blindell*, 56 Fed. Rep. 696; *Pidcock v. Harrington*, 64 Fed. Rep. 821; *Greer v. Stoeller*, 77 Fed. Rep. 1. 40, 56 Fed. Rep. 696; *Gulf, etc. R. R. Co. v. Miami S. S. Co.*, 86 Fed. Rep. 407, 420. *Conf. Shelton v. Platt*, 130 U. S. 591.

² 86 Fed. Rep. 407.

³ *Blindell v. Hagen*, 54 Fed. Rep.

decision of the Supreme Court in *Leisy v. Hardin*,¹ and was passed to enable each State to regulate, or prohibit, traffic carried on within its limits. The terms of the statute are general, and make all intoxicating liquors, upon arrival within a State, subject to the laws of that State which are enacted in the exercise of its police powers; and it has been held that this provision is broad enough to bring within the operation of State laws prohibiting restraint of trade the contract by which the liquor is imported into the State. Thus, in *Fuqua v. Pabst Brewing Co.*,² where beer was shipped from Wisconsin into Texas upon a contract which provided that the purchaser should handle only the beer manufactured by the seller, and that the manufacturer should sell to no dealer in competition with him, it was held that these provisions of the contract in restraint of interstate trade were, by the Wilson act, brought within the operation of the Anti-Trust Law of Texas; that the contract was, under that law, illegal, and that no recovery could be had upon it.

It seems, however, that this decision is not in accord with principle. Contracts in restraint of interstate trade are governed by the Federal law; and while the Wilson act permits State legislation to operate upon the subjects of interstate commerce in certain cases, it does not restrict the operation of the Federal statute. It is equally clear that State statutes and the Federal statute upon this subject cannot both operate upon the same contract at the same time.

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further

¹ 135 U. S. 100.

² 90 Tex. 208.

legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."¹

FEDERAL POLICE REGULATION OF COMMERCE.

The Federal power of commercial regulation includes necessarily a power of police supervision.

Immigration.—Congress has passed a large number of statutes regulating the transportation of persons to the United States from foreign countries. Idiots, insane persons and persons liable to become a public charge, persons suffering from a loathsome or dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, and polygamists, are excluded from the United States.²

Every alien passenger is subject to a duty of one dollar.³ The money thus collected constitutes a fund used to defray the expense of regulation of immigration and for the relief of immigrants in distress. It is forbidden to prepay transportation or to assist or encourage immigration of aliens to the United States under contracts for their service or labor.⁴ Coolies and Chinese are also excluded.⁵ The transportation

¹ *Prigg v. Pennsylvania*, 16 Pet. 539, 617. *Conf. The Chusan*, 2 Story, 466.

² Act of March 3, 1891, 26 Stat. L. 1084, Supp. Rev. Stat. 934; Act of March 3, 1893, 27 Stat. L. 569; Act of Aug. 3, 1882, 22 Stat. L. 214, Supp. Rev. Stat. 370; Act of March 3, 1875, 18 Stat. L. 477, Supp. Rev. Stat. 87.

³ Act of Aug. 18, 1894, 28 Stat. L. 391.

⁴ Act of Feb. 26, 1885, 23 Stat. L. 332, Supp. Rev. Stat. 479; Act of Feb. 28, 1887, 24 Stat. L. 414, Supp. Rev. Stat. 541; Act of Oct. 19, 1888, 25 Stat. L. 565, Supp. Rev. Stat. 633;

Act of March 3, 1891, 26 Stat. L. 1084, Supp. Rev. Stat. 934; Act of March 3, 1893, 27 Stat. L. 569; *Lees v. United States*, 150 U. S. 476; *Church of Holy Trinity v. United States*, 148 U. S. 457; *In re Florio*, 48 Fed. Rep. 114; *In re Cummings*, 32 Fed. Rep. 75; *The Federal Contract Labor Law*, Harvard Law Review, vol. XI, p. 525.

⁵ Rev. Stat., tit. XXIX, Immigration, secs. 2158-2164; Act of March 3, 1875, 18 Stat. L. 477, Supp. Rev. Stat. 86; Act of May 6, 1882, 22 Stat. L. 58, Supp. Rev. Stat. 342; Act of July 5, 1884, 23 Stat. L. 115,

of passengers by sea is mutually regulated by statutes providing for accommodations, food and treatment.¹

Adulterated Food.—It is unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquor adulterated or mixed with any ingredient injurious to health.²

Inspection of Animals and Animal Products.—The importation or exportation of neat cattle, sheep and other ruminants and swine which are diseased or infected, or which have recently been exposed to infection, is prohibited, and the Secretary of Agriculture is authorized to establish quarantine regulations to enforce these provisions.³ Transportation from State to State of live-stock affected with contagious or communicable disease is prohibited.⁴

By the act of August 30, 1890, the Secretary of Agriculture was also authorized to cause inspection of salted pork and bacon intended for exportation, to determine whether it is wholesome, sound and fit for human food, whenever any foreign country to which such articles are to be exported shall require inspection thereof, and also whenever any dealer in meats intended for exportation shall request inspection.⁵

By the act of March 3, 1891,⁶ these requirements are extended to compel inspection of all cattle intended, or whose meat is intended, for exportation to foreign countries, and

Supp. Rev. Stat. 458; Act of Sept. 13, 1886 (see note 1, Supp. Rev. Stat. 625); Act of Oct. 1, 1888, 25 Stat. L. 504, Supp. Rev. Stat. 625; Act of May 5, 1892, 27 Stat. L. 25; Fong Yue Ting v. United States, 149 U. S. 698.

¹ Act of Aug. 2, 1882, 22 Stat. L. 186, Supp. Rev. Stat. 363.

² Act of Aug. 30, 1890, 26 Stat. L. 414, Supp. Rev. Stat. 794; Act of March 2, 1897; Sang Lung v. Jackson, 85 Fed. Rep. 502.

³ Act of August 30, 1890, 26 Stat. L. 414, Supp. Rev. Stat. 794.

⁴ Act of May 29, 1884, 23 Stat. L. 31, Supp. Rev. Stat. 435. As to the scope of this act, see Mullen v. Western Union Beef Co. (Colo.), 49 Pac. Rep. 425; Davis v. Texas, etc. Ry. Co., 12 Tex. Civ. App. 427.

⁵ 26 Stat. L. 414, Supp. Rev. Stat. 794.

⁶ 26 Stat. L. 1062, Supp. Rev. Stat. 937.

of all cattle, sheep and hogs which are subjects of interstate commerce and about to be slaughtered, and whose meat is to be transported to any other State for consumption.

It is doubtful whether these two statutes, so far as they pertain to inspection of slaughtering and packing, are within the constitutional power of Congress. In *United States v. Boyer*,¹—an indictment for attempting to bribe an inspector appointed under these acts to consent that condemned carcasses might be made into food products,—the court held that slaughtering and packing of cattle intended for transportation to other States and Territories was not interstate commerce or subject to regulation by Congress; that inspection of meat during the process of packing belongs to the States; that the inspector was not performing a duty as a Federal officer, and therefore the attempt to bribe was not a Federal offense.

It is probable that the most conclusive method of determining whether meat is fit for food is by inspection at the slaughter-house. It may be argued, therefore, that, as the United States has the right to inspect subjects of interstate transportation, it may, where necessary, make its examination at the time of slaughtering and packing, before transportation has begun. The difficulty is that, as the State has undoubted power to inspect the preparation of the meat, and to make regulations to give effect to such inspection, and prevent unsound meat from being packed or prepared for market, a Federal inspection, with attendant regulations for its enforcement, would cause a conflict of rules, and result in a serious interference with the execution by the State of its admitted power.

¹ 85 Fed. Rep. 425.

CHAPTER XII

RELATIONS WITH THE INDIAN TRIBES.

The Constitution contains but two references to the Indian tribes. The first, providing that representatives and direct taxes shall be apportioned among the States according to their respective numbers, counting the whole number of persons in each State and excluding Indians not taxed,¹ suggests the inference that the framers of the Constitution contemplated that some of the Indians would not be included in the general mass of the population of the different States, and would not be subject to State jurisdiction.

The second provision upon the subject is found in the commerce clause. During the convention, Mr. Madison, on the 18th of August, 1787, moved that Congress should be given authority "to regulate affairs with the Indians as well within as without the limits of the United States." The committee to which the proposition was referred reported September 4th, and upon their recommendation the words, "and with the Indian tribes," were added to the clause.² Other provisions of the Constitution have also been referred to as the source of powers belonging to the Federal government over the Indians. These are the powers to declare war, including that of bringing war to an end and securing peace; to protect the States against invasion; to make all needful rules and regulations respecting the territory of the United States; the treaty-making power, and the power of Congress to make all laws necessary and proper to carry these powers into effect.³

None of the clauses mentioned define the relation of the

¹ Const. U. S., art. 1, sec. 2, 14th Amendment. 1, pp. 522-524; Journal of Convention, Madison (edited by Scott), p. 549.

² Curtis' Const. History (1897), vol. 1. ³ See generally concerning Indian

United States with the Indian tribes, and it is probable that a strict construction, such as was at one time adopted with other portions of the Constitution to restrict the Federal power, would practically deprive Congress of all effective control over the Indian tribes.

Definition of Indian Commerce.—In examining the history of Federal legislation upon this subject, it is difficult to trace to its appropriate source in the Constitution each authority which has been exercised, and to say what cases are illustrations of the exercise of a certain power and what are not.¹ This is particularly true of the power of commercial regulation, which has in a general way been referred to as the basis of jurisdiction over intercourse which had no commercial nature whatever, and where there was no act of transportation,—as in the case of the intercourse of a white missionary living among the Indians.²

Other illustrations of the variety of cases in which the commerce clause has been referred to are found in the decision that a State Probate Court had no jurisdiction to administer upon the estate of an Indian who had lived upon a tract of land in a State reserved to him alone,³ and that State courts could not take jurisdiction of a prosecution against an Indian for adultery committed with a white person upon an Indian reservation in a State, although the white person was within the State jurisdiction.⁴

It is probable, however, that no Federal jurisdiction over the Indians can arise from this clause that is not commercial in character, and that to constitute commerce with the Indians the same elements must exist which are essential to com-

relations, Story on the Constitution, secs. 8 et seq., 152 et seq., 1065, 1097, 1101, 1983; Kent's Commentaries (14th ed.), vol. 1, pp. 257, 258, p. 64, note; vol. 2, pp. 72, 73; vol. 3, pp. 378-399; The Federalist, No. XLII.

¹ Von Holst, Const. Law of U. S., sec. 38, p. 186, note 3.

² See concurring opinion of Mr. Justice Washington in Worcester v. Georgia, 6 Pet. 515, 581, 590.

³ United States v. Shanks, 15 Minn. 369.

⁴ State v. Campbell, 58 Minn. 354.

merce with foreign nations or among the States.¹ At the same time it should be noticed that the extent and purpose of the Federal control over commerce is much greater over that with the Indians than over interstate or foreign commerce. The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks.

A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce.

Indian Tribes Occupying Federal Territory.—In the memorable decisions of *Cherokee Nation v. State of Georgia*,² and *Worcester v. State of Georgia*,³ it was held that although the United States had in some ways treated the Indian tribes as independent sovereignties, and had entered into treaties with them, nevertheless they were not foreign nations within the meaning of the Constitution.

They are within the geographical limits of the United States. They and their country are considered by foreign nations, as well as by the United States, as so completely under the Federal control that any attempt to form a political connection with them, or to acquire their land, would be an invasion of the rights of the United States government and an act of hostility. "They occupy a territory to which we assert a title independent of their will, which must take

¹ See opinion of Mr. Justice Baldwin, *Cherokee Nation v. Georgia*, 5 Pet. 81, 43; Opinion of Mr. Justice Thompson, *id.* 50; *United States v. Kagama*, 118 U. S. 375, 378.

² 5 Pet. 1.

³ 6 Pet. 515, 536. See also *Roff v. Burney*, 168 U. S. 218; *Mackey v. Coxe*, 18 How. 100.

effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."¹

In *United States v. Kagama*² this subject was fully considered. Over Indians upon land under territorial government, it is said, the power of Congress arises principally from the ownership of the country. The rights of exclusive sovereignty must exist in the national government, for they can be found nowhere else. "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."³ The country which is thus occupied by Indians is a part of the territory of the United States, assigned to the different tribes, but subject to the Federal authority, like all other land within its domain.⁴

Indian Tribes Within a State.—When a tribe of Indians occupies land within the boundaries of a State, the question of Federal jurisdiction presents somewhat different aspects. The police powers of the several States with reference to the Indian tribes must, so far as affected by the Constitution, be equal; but the actual power which any State may exercise depends upon the legislation of Congress and the degree of control exercised by the United States over the tribes in that State. In the original States a more extensive police power in relation to Indian tribes has been sanctioned by

¹ *Cherokee Nation v. Georgia*, 5 Pet. 511, 542; *United States v. Kagama*, 118 U. S. 375, 380.

² 118 U. S. 375.

⁴ *United States v. Rogers*, 4 How.

³ *American Insurance Co. v. Can-* 567; *United States v. Kagama*, 118 U. S. 375.

the Federal government than in some of the new States created out of Federal territory. The different history and circumstances of the tribes has led to diverse degrees of control and correspondingly varied scope of local legislation. It is to be noted, too, with reference to other than commerce powers, that some of the original States had the pre-emptive title to lands occupied by Indian tribes,¹ while in the States created from Federal territory the pre-emptive title was in the United States.

Congress, in the Enabling Acts for the formation of new States, has sometimes legislated on the subject of control over the Indian tribes and their reservations; and such enactments have occasionally prevented local action.² Before the Revolution each colony managed its own Indian affairs, and even after the adoption of the Constitution this practice still continued to a considerable extent. In some States, as in Maine and New York, the authority over Indians within their borders has long been unquestioned, and it was argued that the principles which established the Federal authority over Indians occupying lands of the United States established State authority over Indians occupying land belonging to a State. Some recognition of this doctrine appears in the provision of the Trade and Intercourse Act of 1802, that it shall not be so construed "to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States."³

It was apparent that some controlling jurisdiction over such tribes was necessary. The Indians could not possess an independent government within the limits of a State, for by the Constitution no new State shall be founded or erected within the jurisdiction of any other State without its consent. If, therefore, Congress could not erect a Federal State

¹ *In re Narragansett Indians* (R. I.),
40 Atl. Rep. 847.

² 9 U. S. Stat. L. 139 to 146 incl.
See *In re Narragansett Indians*

³ *The Kansas Indians*, 5 Wall. 737. (R. I.), 40 Atl. Rep. 847.

within the territory of one of the States of the Union, much less could it allow a foreign and independent government to establish itself there.¹

It followed, then, that if the Indians could not erect independent governments, they must be under the jurisdiction either of individual States or of the United States, for these are the only governments within the geographical limits of the nation. As between them the United States alone was adequate, either in the extent of its powers, or in the means at its disposal, to exercise control. The States could make no treaties, could not declare war, nor even keep the troops which in time of peace must be kept as a protection against attack. The Federal government had these powers, and moreover it could regulate commerce with the Indian tribes. This included not only power to regulate traffic in commodities, but all commercial intercourse with the tribes, and involved control over the personal conduct of those engaged in that intercourse.² The Federal government could exercise its power in any locality, whenever there was a subject to act upon, although within the limits of a State.³

Its jurisdiction over the Indians is therefore well established, and continues as long as the tribal organization continues. So long as an Indian tribe is recognized by the executive department of the Federal government, the fact that the primitive habits and customs of the tribe have been broken into by their intercourse with whites does not authorize a State to regard their tribal organization as gone, and to extend its jurisdiction over them.⁴

Nature of Federal Jurisdiction.—Commerce with foreign nations and among the several States is that commerce which

¹ Message of President Jackson, *United States v. Martin*, 14 Fed. December, 1829, 37 Niles Reg. 247. Rep. 817; *United States v. Bridle-*

² *United States v. Bridleman*, 7 Fed. Rep. 894. See *Ward v. Race Horse*, 168 U. S. 504. Fed. Rep. 894; *United States v. Holliday*, 8 Wall. 407.

⁴ *The Kansas Indians*, 5 Wall. 737,

³ *United States v. Forty-three Gallons of Whiskey*, 98 U. S. 183; *missioners of Johnson County*, 8 In re *Race Horse*, 70 Fed. Rep. 508; Kan. 290.

involves transportation across State lines, and is put within Federal control to avoid discriminating, conflicting and burdensome State legislation. Commerce with the Indian tribes frequently involves no such transportation. It may be carried on wholly within the limits of a single State. Control over this branch of commerce was given to Congress, not that transportation might be free, but that an inferior and dependent race might be protected from the rapacity of traders, and that the frontier might be protected from the savage wars which result from injustice and aggression by either side. In this case, therefore, the power of Congress is not determined by the locality of the traffic, but extends wherever intercourse with Indian tribes, or with any member of an Indian tribe, is found, although it may originate and end within the limits of a single State.¹ The jurisdiction is therefore personal rather than economic in its nature.

The power which the United States has exercised over the Indians may not be justified by the commerce clause alone, but results from the nature and general power of the national government, and from the necessities of the case.²

In the exercise of this jurisdiction Congress has prescribed minute regulations of Indian affairs, governing the intercourse of Indians with each other and with the whites, and has established both a civil and criminal jurisdiction.

Criminal Jurisdiction Over the Indians.—The power to define and punish under Federal law crimes committed by, or against, tribal Indians, or on their reservations, can to a limited degree only be based on the commerce clause, and must be found principally in other constitutional provisions.

It was held in a famous case that Georgia could punish the murder of one Indian by another, although committed within an Indian reservation in the State,³ and although the Federal treaties recognized the criminal jurisdiction of the

¹United States v. Holliday, 8 Wall. 407. Conf. Territory v. Guyott, 9 Mont. 46.

²United States v. Kagama, 118 U. S. 875.

³Worcester v. State of Georgia, 6 Pet. 515.

tribe. The same claim of jurisdiction received the attention of the Supreme Court of the United States upon the indictment of one Samuel A. Worcester, a native of Vermont, who had resided upon the Cherokee reservation in Georgia as a missionary, and who was indicted by the grand jury of Gwinnett county, Georgia, for so doing without a license from that State. Upon this indictment Worcester was convicted and sentenced to confinement in the State penitentiary at hard labor for a period of four years. A writ of error being taken from the Supreme Court of the United States, it was held by that court that the State law in question was repugnant to the Constitution and void, and the judgment against Worcester reversed. The State of Georgia, however, refused to pay attention to its proceedings. No counsel appeared on its behalf at the time the case was argued, no attention was paid to the order of reversal, and "through every department of her Government she treated the mandate and the writ of error with contempt the most profound. She did not even protest against jurisdiction as she had done in the case of *Chisholm's Ex'r*. But she kept Worcester and Butler in the penitentiary, and she executed in the Creek Nation the laws, for violating which, they had been put in the penitentiary."¹

These claims of sovereignty have of course long since disappeared with the doctrine of State rights upon which they were based, and the Federal power is now unquestioned.

Commerce Clause and Criminal Jurisdiction.—In some cases where commerce was not involved the clause was considered as throwing light upon the relations of the Federal government and of the State to the Indian tribes. It has been held that Congress can provide for the punishment of manslaughter committed by a white man against an Indian upon a reservation within a State,² and by an Indian against

¹ *Padelford v. Mayor of Savannah*, 14 Ga. 440, 448, 482; Schouler, *History of the United States*, vol. IV, p. 284; 1 Greeley's *Reollections*, 106.

² *United States v. Barnhart*, 22 Fed. Rep. 285.

a white man on such a reservation,¹ or in a Territory;² and murder of one citizen by another on a reservation;³ that a State can punish a white man for the murder of an Indian within country occupied by an Indian tribe in a State;⁴ that it may forbid and punish the sale of liquor to Indians;⁵ and that it may punish an Indian for adultery committed while on a reservation.⁶ On the other hand, it is held in Minnesota that, while a State may punish a non-tribal half-breed for such an offense, it cannot punish a tribal Indian.⁷ It is also held that so long as tribal customs are maintained, and while subject to the management of the Federal Indian agent, the Indians upon a reservation within a State are not subject to State laws regulating marriage and inheritance.⁸ The criminal as well as civil jurisdiction of a State over its own citizens on an Indian reservation in its limits, and over Indians in common with all other persons within the State and not upon a reservation, is not excluded in the absence of conflicting Federal legislation.⁹

The Civil and Criminal Jurisdiction of the Tribe.—Until recently, while their relations to the Federal government were controlled by treaties, the Indian tribes were permitted to control their internal affairs.

In 1871 the United States, after an experience of a hundred years, abandoned this system and made all Indians subject to the acts of Congress. The statute which marks the change provides that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with

¹ United States v. Martin, 14 Fed. Rep. 817.

² United States v. Cha-ta-kah-nap-she, Hemp. 27; Act of Aug. 15, 1876, 19 Stat. at L. 176, Supp. R. S. 121.

³ Conf. United States v. Bailey, 1 McLean, 234.

⁴ Caldwell v. State, 1 Stewart & Porter (Ala.), 327.

⁵ Territory v. Guyott, 9 Mont. 46.

⁶ State v. Harris, 47 Wis. 298; State v. Dextater, 47 Wis. 278.

⁷ State v. Campbell, 53 Minn. 354.

⁸ Boyer v. Dively, 58 Mo. 510.

⁹ United States v. Yellow Sun, 1 Dill. 271.

whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."¹ In 1885 this policy was followed by enacting that thereafter Indians guilty of certain crimes mentioned, against the person or property of another Indian, etc., within a Territory, should be subject to its laws and tried in the same courts as other persons charged with such crimes, and where they commit the offenses within a reservation in a State they shall be subject to the same laws and tried in the same courts as other persons committing such crimes within the exclusive jurisdiction of the United States;² and this statute has been sustained as applied to an offense committed by one Indian against another upon a reservation within the limits of a State.³

Offenses committed upon an Indian reservation by an Indian against the person or property of another are not within State jurisdiction.⁴ Offenses committed by Indians within a State and without the reservation are generally subject to State jurisdiction;⁵ but violation of the Federal statutes relating to trade and intercourse may be punished without reference to the place where the act of violation was committed, whether within the limits of a reservation or outside the reservation and within a State.⁶ Congress may punish the sale of intoxicating liquors by one tribal Indian to another,⁷ and a sale to Indians whose tribal organization has been abandoned, and who have become electors and hold

¹ Act of March 3, 1871, U. S. R. S., *Contra*, State v. Foreman, 8 Yerg. sec. 2079. 256.

² Act of March 3, 1885, 23 Stat. L. 835, Supp. R. S., pp. 482, 483.

³ United States v. Kagama, 118 U. S. 375; United States v. Thomas, 151 U. S. 577.

⁴ United States v. Kagama, 118 U. S. 375; *Ex parte* Crow Dog, 109 U. S. 567; *Ex parte* Cross, 20 Neb. 417.

⁵ Whart. Crim. L. (10th ed.), sec. 282a.

⁶ United States v. Forty-three Gallons of Whiskey, 93 U. S. 188, reversing 19 Int. Rev. Rec. 158.

⁷ United States v. Shaw Mux, 2 Sawy. 364.

land in severalty, but are still under Federal guardianship;¹ and where an Indian has severed all relations with his tribe, it is held this jurisdiction may be exercised by a State.² It has been held that Congress can authorize the President to regulate and prohibit the introduction of distilled spirits into the district of Alaska.³

Civil Jurisdiction Over Indian Trade.—The extent of the Federal power over the Indians appears most conspicuously in the character of the regulations which govern trade and intercourse with them. The settled practice of the government recognizes that this intercourse cannot be left to the operation of commercial laws which control trade with civilized nations, but must be subject to extraordinary governmental supervision, both for the protection of the Indians and the white persons living on the frontier. Congress cannot effectually control commerce with the Indian tribes without such regulations as shall preserve those tribes from an indiscriminate commercial intercourse with the whites.⁴

Congress can regulate trade and intercourse with the Indian tribes⁵ within as well as without the Indian country,⁶ and in so doing may extend its revenue and police laws over the Indian reservations;⁷ and this jurisdiction excludes State taxation of property used in such trade.⁸ In the exercise of these powers it has prohibited all trade with the Indians, except by such persons as shall be appointed by the Commissioner of Indian Affairs and shall have given bond as

¹ *Renfrow v. United States*, 8 Okl. 161.

² *State v. Wise*, 72 N. W. Rep. 843.

³ *The Louisa Simpson*, 2 Sawy. 57; *United States v. Nelson*, 29 Fed. Rep. 202.

⁴ *United States v. Ciana*, 1 McLean, 254, 260.

⁵ *United States v. Richard & Co.*, 1 Ariz. 81.

⁶ *United States v. Seveloff*, 2 Sawy. 311; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188.

⁷ *United States v. Tobacco Factory*, 1 Dill. 264; *The Cherokee Tobacco*, 11 Wall. 616.

⁸ *Foster v. Board*, 7 Minn. 84.

required in the statutes,¹ and this regulation has been sustained.²

It is provided that the regulations governing this trade may be prescribed by the Commissioner, who may specify the kind and quantity of goods and the price at which they shall be sold to the Indians.³ Any person other than an Indian of full blood who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein, without a license, forfeits all merchandise offered for sale to the Indians or found in his possession, and is subject to fine.⁴

The United States has also prevented Indians from leaving their reservations, a notable instance being found in the statute of May 11, 1880, passed during the early movements into the Cherokee strip, whereby officers or agents of the army or of the Indian Bureau were prohibited, except as specially directed by the President, from granting permission to any Indian or Indians upon any reservation to go into the State of Texas.⁵

The President is authorized, whenever in his opinion public interest may require, to prohibit the introduction of goods, or of any particular article, into the country of any Indian tribe, and to direct all licenses to trade with such tribe to be revoked and all applications therefor to be rejected.⁶

Foreigners are prohibited from going into the Indian country without a passport from the department or some officer in charge of the Indians, etc., and every such passport shall express the object which the person has in entering the country, the time he may remain and the route which he

¹ Act of Aug. 15, 1876, 19 Stat. L. 176, Supp. R. S. 121; Act of July 26, 1866, R. S., sec. 2123.

² *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188. See *Jones v. Eisler*, 8 Kan. 184. Conf. *Taylor v. Drew*, 21 Ark. 485; *Hicks v. Ewhartsonah*, 21 Ark. 106.

³ Act of Aug. 15, 1876, 19 Stat. L. 200, Supp. R. S. 121.

⁴ Act of June 30, 1834, U. S. R. S., sec. 2133, amended, Act of July 31, 1882, 22 Stat. L. 170, Supp. R. S. 362.

⁵ Act of May 11, 1880, 21 Stat. L. 114.

⁶ U. S. R. S., sec. 2182.

shall travel.¹ It is forbidden for any person other than an Indian, within the Indian country, to barter for articles used in hunting, husbandry or cooking, or for any articles of clothing, except skins or furs.² It is also forbidden for whites to take game in certain Indian country;³ to drive cattle therefrom for the purpose of trade or commerce;⁴ to drive stock, without consent of the tribe, upon Indian lands to feed;⁵ or to sell liquor to the Indians.⁶

Indian Lands.—The extension of Federal jurisdiction over the land occupied by Indians necessarily impaired the rights of the Indians in their ownership and control of that land. "They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."⁷

The territory which the United States has acquired has been occupied by numerous and warlike tribes of Indians, but the exclusive right of the United States to extinguish their title and grant the soil has never been doubted. The existence of this power must negative and control any other power which may conflict with it. An absolute title to land cannot exist at the same time in different persons or in different governments, and the absolute title of the Federal government, which is subject only to the Indian right of

¹ U. S. R. S., sec. 2134.

² U. S. R. S., sec. 2135.

³ U. S. R. S., sec. 2137.

⁴ U. S. R. S., sec. 2138.

⁵ U. S. R. S., sec. 2117.

⁶ U. S. R. S., sec. 2139; Act of July 4, 1884, Supp. R. S. 450; Act of July 23, 1892, 27 Stat. L. 260; Act of March 1, 1895, 26 Stat. L. 693; Act

of January 30, 1897, 29 Stat. L. 506; *Renfrow v. United States*, 3 Okl. 161; *United States v. Forty-three Gallons of Whiskey*, 98 U. S. 188; *United States v. Holliday*, 3 Wall.

407; *Territory v. Guyott*, 9 Mont. 46. ⁷ *Johnson v. MacIntosh*, 8 Wheat. 543, 574.

occupancy, is incompatible with absolute and complete title in the Indians. It is therefore held that an Indian tribe cannot grant a title to their lands to private individuals. The United States alone may prescribe the manner in which the Indian title may be extinguished.¹ This rule is now embodied in the statute which provides that no purchase or other conveyance of lands or any title or claim thereto from any Indian nations shall be valid, unless made by treaty or convention entered into according to the Constitution. Persons who, not being employed by authority of the United States, attempt to negotiate such a treaty for purchase of lands held or claimed by Indians, are subject to a penalty.²

There are a number of statutes providing for the allotment of lands in severalty to a member of an Indian tribe who desires to adopt the habits of civilized life.³ Upon such allotment the Indian receiving the land becomes, to some extent, subject to the laws of the State or Territory within which his land lies,⁴ although he still has the privilege of use of Indian schools, is restricted in his ability to alienate his land,⁵ and is subject to some of the restrictions of the Federal statutes.⁶

The sale or lease of land is not commerce within the meaning of the clause, yet by virtue of other provisions of the Constitution, and the historical relations of the United States with the Indians, it may control the lease and sale of the lands of tribal Indians within a reservation in a State. In some of the cases where this power has been supported, the

¹ *Johnson v. MacIntosh*, 8 Wheat. 543; *United States v. Boyd*, 83 Fed. Rep. 547; *Wood v. Missouri, etc. R. Co.*, 11 Kan. 323.

² Act of June 30, 1834, U. S. R. S., sec. 2116.

³ Act of June 14, 1862, U. S. R. S., sec. 2119; Act of Feb. 8, 1887, 24 Stat. L. 388, Supp. R. S. 534, 536; Act of Feb. 28, 1891, 26 Stat. L. 794, Supp. R. S. 897, 635.

⁴ Act of Feb. 8, 1887, 24 Stat. L. 388, Supp. R. S. 536; *United States v. Boyd*, 83 Fed. Rep. 547.

⁵ *United States v. Flournoy Real Estate Co.*, 71 Fed. Rep. 576; *Pilgrim v. Beck*, 69 Fed. Rep. 895; *United States v. Flournoy Real Estate Co.*, 69 Fed. Rep. 886; *Beck v. Real Estate Co.*, 65 Fed. Rep. 80.

⁶ *Renfrow v. United States*, 3 Okl. 161.

commerce clause has been mentioned. It has been held, for instance, that Congress can authorize the lease of lands in a State to whites by Indian members of a tribe;¹ and may prevent such leases without authority of the Secretary of War, where the tribal relations are in process of dissolution;² and may regulate the sale of tribal Indian lands.³

It has been held a State may not authorize leases to whites of tribal Indian lands in its limits,⁴ and provisions in a State Constitution and statutes must yield to an act of Congress giving validity to existing leases from members of tribal Indians to white persons.⁵

Where an Indian acquired title to land in severalty which was granted to his father for services in the Revolutionary War, he may convey it without authority of Congress.⁶

A State under its police power may make it unlawful for other persons than Indians to settle or reside upon tribal lands and provide for their summary ejectment;⁷ and a State may authorize the construction of a highway within an Indian reservation;⁸ and to exercise its jurisdiction over its own citizens may include an Indian reservation within the boundary of a town.⁹

¹ *Buffalo & P. R. Co. v. Lavery*, 27 N. Y. Supp. 443; *Ryan v. Knorr*, 19 Hun, 540.

² *United States v. Flournoy Live-Stock, etc. Co.*, 69 Fed. Rep. 886.

³ *Seneca Nation of Indians v. Christie*, 126 N. Y. 122.

⁴ *Buffalo & P. R. Co. v. Lavery*, 27 N. Y. Supp. 443.

⁵ *Ryan v. Knorr*, 19 Hun, 540.

⁶ *Murray v. Wooden*, 17 Wend. 531.

⁷ *People ex rel. Cutler v. Dibble*, 21 How. 366, 16 N. Y. 203, 18 Barb. 412.

⁸ *O'Meara v. Commissioners*, 3 Sup. Ct. (N. Y.) 235; *France v. Erie Ry. Co.*, 2 Hun, 513.

⁹ *Schriber v. Town of Langlade*, 66 Wis. 616.

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